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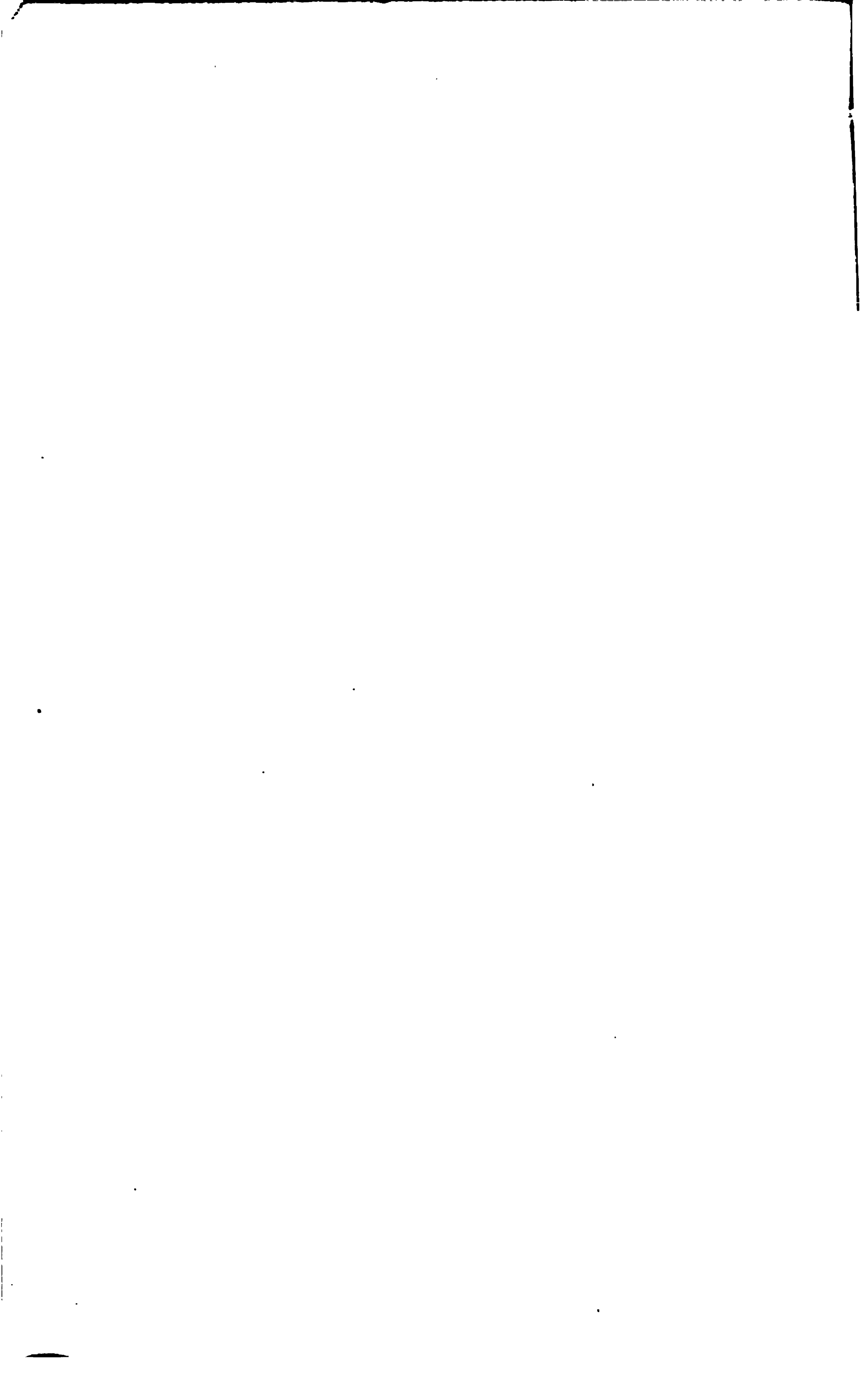
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**AMERICAN
NEGLIGENCE REPORTS
CURRENT SERIES**

[CITED AM. NEG. REP.]

**ALL THE CURRENT NEGLIGENCE CASES DECIDED IN THE FEDERAL
COURTS OF THE UNITED STATES, THE COURTS OF LAST
RESORT OF ALL THE STATES AND TERRITORIES AND
SELECTIONS FROM THE INTERMEDIATE COURTS**

**TOGETHER WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

**EDITED BY
JOHN M. GARDNER
OF THE NEW YORK BAR**

VOL. V

**NEW YORK
REMICK & SCHILLING
1899**

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WEED-PARSONS PRINTING COMPANY,
PRINTERS, ELECTROTYPERS AND BINDERS,
ALBANY, N. Y.

PREFACE.

In this volume, 5 AMERICAN NEGLIGENCE REPORTS, the plan of the previous volumes of the Current Series of Reports of Negligence cases has been extended by the addition of many notes upon the cases reported, a list of which notes is to be found at the end of the Table of Cases Reported.

The cases reported comprise those arising out of Negligence of Carriers, Corporations, Landlord and Tenant, Master and Servant, Municipal Corporations, Railroads, etc., during 1898 and 1899, decided in the highest courts of the States and Territories of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois (Supreme and Appellate Courts), Indiana (Supreme and Appellate Courts), Indian Territory, Iowa, Kansas (Supreme and Appellate Courts), Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri (Supreme and Appellate Courts), Montana, Nebraska, Nevada, New Hampshire, New Jersey (Supreme Court and Court of Errors and Appeals), New Mexico, New York (Court of Appeals and Appellate Division of Supreme Court), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas (Supreme Court and Court of Civil Appeals), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, together with cases in the Circuit Courts, Circuit Courts of Appeal, and the Supreme Court of the United States.

Annotations and notes of English cases will be found of interest in connection with the citations in several of the decisions

reported herein. The Table of Cases Classified, which precedes the Index, is a ready guide to a case in point.

The Editor cordially acknowledges the able services of Mr. Alfred J. Hook, of the Brooklyn Law Library, in the preparation of the cases and notes in this volume of American Negligence Reports, and also acknowledges the able services of Mr. Walter J. Eagle, in the compilation of the Tables, etc., and seeing the volume through the press.

JOHN M. GARDNER.

New York, *June*, 1899.

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AMERICAN NEGLIGENCE REPORTS.

WHITE v. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, October, 1898.

COLLISION AT RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE. — Plaintiff was not guilty of contributory negligence where it appeared that while driving at a walk he approached from the east defendant's railroad tracks running north and south; that on reaching the tracks his view was interrupted towards the south by box cars blocking his passageway over the street to the width of about fifteen feet; that he looked and listened and saw and heard no train approaching; that his view towards the north was clear, and, if a train with an engine at its head had been coming from the south, he could have seen the smokestack of the engine; that a person driving from the opposite direction, having a complete view towards the south, passed him, and did not indicate that a moving train was approaching; that he then drove past the first track at the end of the box cars and was injured by a freight train backing from the south, before he could avoid it (1).

DEPARTMENT 1. Appeal from Superior Court, San Joaquin County. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

DUDLEY & BUCK, for appellant.

NICOL & ORR, for respondent.

1. The following are some recent cases that arose from collisions at crossings:

In FENNEL v. HARRIS (*Supreme Court, Pennsylvania, February, 1898*), it appeared that a carter whose view of the tracks at a street crossing was obstructed, stopped, looked and listened and only attempted to cross when he found the safety gates open,

and after being twice signaled by the flagman to do so, and when he first could view the tracks he saw a train rapidly approaching without warning and so near as to make escape impossible. It was held that he was not guilty of contributory negligence as matter of law.

In BOYDEN v. FITCHBURG R. R. Co. (*Supreme Court, Vermont, January,*

GAROUTTE, J. — Defendant appeals from a judgment and order denying its motion for a new trial. The action was brought to recover damages for personal injuries. Plaintiff was in the act of driving across the railroad track of defendant, when a train approached, and, in attempting to save himself from a collision, he was thrown out of his vehicle, and injured. The matters involved in this appeal are few, and not of great importance. The negligence of defendant at the time of the accident is substantially conceded by its attorneys. Indeed, the testimony of its principal witnesses — employees — indicates a degree of negligence upon its part in the handling of its train of cars closely approaching recklessness. But, to defeat plaintiff's right of action, it is insisted that he was guilty of contributory negligence, and for that reason it is claimed the evidence fails to authorize and justify the verdict of the jury. By reason of this contention we are brought to an examination of the salient facts of the case. Plaintiff, in a one-horse vehicle, was traveling westward upon Market street, a well-traveled street in the city of Stockton. He arrived at Sacramento street, which intersects Market street, and extends north and south. This street is covered by various railroad tracks of defendant, and is used constantly for

1898), it was held that a railroad was not relieved of duty to one crossing its tracks though he was traveling on Sunday in violation of the statute; that he stood no worse than an ordinary trespasser, and a railroad company owes a trespasser at least the duty not wilfully to run over him.

In *MCCANNA v. NEW ENGLAND R. R. Co.* (*Supreme Court, Rhode Island, March, 1898*), it appeared that plaintiff was driving a spirited horse and approached a railroad crossing with which he was perfectly familiar from a direction from which an unobstructed view could be had for a considerable distance until the crossing was almost reached when the view would be obstructed by a bank covered with trees. His horse continued on a trot with a slack rein until within sixty or seventy feet of the crossing, when he heard the whistle of a regular train and it was too late for him to stop the horse, that plunged forward and into the rear of the third car, and plaintiff was thrown to the ground, and the horse died from

the injuries received. *Held*, that plaintiff was guilty of contributory negligence.

In *FINLEY v. CHICAGO, M. & ST. P. R'y Co.* (*Supreme Court, Minnesota, February, 1898*), it appeared that the wagon was struck in which the plaintiff was riding with her husband, and it was held that his negligence, if any, was not imputable to her, and that it was a question for the jury whether she was guilty of contributory negligence in failing herself to look and listen or to observe that her husband was not using due care to look and listen, if such was the fact.

In *CHICAGO, B. & Q. R. R. Co. v. POLLARD* (*Supreme Court, Nebraska, February, 1898*), it appeared that plaintiff knew that a train called the "Flyer," that went by the crossing at about the rate of thirty miles an hour, was about due as he approached the crossing, and that while he was looking down the track for it his attention was attracted by smoke in the opposite direction, and by the time he turned to

railroad purposes. When plaintiff approached Sacramento street, he found a detached train of box cars resting upon the track nearest to him. These cars extended to the south upon the street, and blocked his passageway over Market street to the width of about fifteen feet. He passed over this first track at the end of these box cars, and at the moment his horse stepped upon the next track, which was but a few feet distant, a freight train, backing from the south, was upon him, and in his efforts to escape, he was injured. There is some conflicting evidence as to the ringing of the bell of the engine at the time of the accident, or, to be more exact, it may be said there was some conflict in the evidence as to whether or not plaintiff heard the engine bell ringing. But we attach no special importance to this matter. The ringing of a bell or the blowing of a whistle upon a train that is traveling backward is calculated to deceive a traveler upon the highway. The distance of the alarm from the real point of danger well serves the purpose of lulling the traveler into a false sense of security. This is essentially true where the traveler upon the highway, by reason of obstructions near the track, cannot see the approaching train, and therefore is compelled to depend largely upon his sense of hearing alone. In this case a sight of the approaching train was entirely denied plaintiff by reason of the

again look for the "Flyer" his horses were on the track, and an engine almost upon him, and too late for him to avoid the collision which followed. The view of the track immediately before reaching it was slightly obstructed. The court held that the question of contributory negligence was for the jury.

In *SCHNEIDER v. CHICAGO, M. & ST. P. R'y Co.* (*Supreme Court, Wisconsin, May, 1898*), it was held that one was guilty of contributory negligence who knowing that a train was about due drove to the crossing in a closed milk wagon containing milk cans, beer kegs and other noisy articles that made more or less noise as the wagon passed over the frozen ground with the rear of it towards the expected train, without stopping to look after he was nearer the track than eighty feet from it, though at that point one could not see the train more than forty-four rods away, while at about sixty feet from

the track, the train could be seen when 139 rods distant.

In *BOND v. LAKE SHORE & M. S. R'y Co.* (*Supreme Court, Michigan, July, 1898*), the plaintiff was held to be guilty of contributory negligence as matter of law where it appeared that as she was approaching a crossing she heard a whistle at a station near by, and supposing it was on another road, she went ahead until she heard the alarm whistle when so near the track that she did not dare to stop, but whipped her horse in an attempt to get across and was struck by the train; that she was partially deaf and had the curtains on her buggy closed; that she had lived for fifteen years near the crossing and knew that a train was about due at the time; that the view of the track was unobstructed for a distance of 200 feet before reaching it so that the train could be seen from the time it left the station.

stationary cars and other obstructions. If he had heard the bell upon the engine, which even at the moment of the accident was distant more than fifty yards, he would probably have felt secure, and made the attempt to cross the track. And as matter of law this court would not say that it was contributory negligence, under such circumstances, to rely upon the alarm given by the bell, and attempt to cross. By reason of these views we attach little importance to the true solution of the contested fact as to whether or not the bell was ringing at the time of the accident, or whether or not plaintiff heard the bell ringing if it did ring.

Was the plaintiff, as a careful, prudent man, justified in attempting to cross the street at the time he made the attempt? He was driving one horse, hitched to a light vehicle. Upon arriving at the crossing, he traveled at a walk. He looked and listened. He saw no moving train. He heard no noise of an approaching train. He had a clear view towards the north and there was no danger from that direction. His view towards the south was obstructed, but, if a train with an engine at its head had been coming from that direction, he would have seen at least the smoke-stack of the engine. A moment before he drove upon the track, a party driving from the opposite direction, having a complete view of existing conditions towards the south, passed over the track, and in no way indicated by his actions that a moving train was approaching. The foregoing facts appear by the evidence of the plaintiff, and many of them are corroborated by the evidence of other witnesses. Upon these facts the case was one eminently proper to go to the jury. As matter of law we cannot say this evidence discloses contributory negligence upon the part of the person injured. The other evidence in the record depicting the circumstances surrounding the accident may create a conflict as to certain facts, but it does no more, and therefore avails nothing in the consideration of a question similar to the one at bar. It is contended by appellant that the "physical facts and circumstances" absolutely disprove plaintiff's testimony in all essential respects. Counsel's argument directed to this point has not convinced us of the soundness of this contention.

There is no ground furnished by the two instructions, of which appellant complains, that demands a reversal of the judgment. For the foregoing reasons, the judgment and order are affirmed.

VAN FLEET and HARRISON, JJ., concur.

**WALTERS v. DENVER CONSOLIDATED
ELECTRIC LIGHT COMPANY (TWO CASES).**

Court of Appeals, Colorado, October, 1898.

ELECTRIC LIGHT WIRE — INJURY FROM CONTACT. — Whether it was negligence for an electric light company to leave an uninsulated live wire attached to an insulator that was within reach from a window of a house on which the insulator was placed, was for the jury.

PROXIMATE CAUSE. — The act of a person in touching such a wire so placed is not the proximate cause of the injury resulting, but the condition of the wire is.

CONTRIBUTORY NEGLIGENCE — MOTHER ASSISTING CHILD IN DANGER. — Where it appeared that a boy twelve years of age endeavored to replace an insulator attached to a naked electric wire upon its support, which was attached to his father's house directly under and in reach of the window, and received a shock, and his mother went in great haste to his assistance and took hold of him, and she also received a shock, the questions of negligence were for the jury.

FROM an order of District Court, Arapahoe County, dismissing complaints, plaintiffs appeal.

WELLS, TAYLOR & TAYLOR and R. T. MCNEAL, for appellants.

WOLCOTT & VAILE and WILLIAM W. FIELD, for appellee.

THOMPSON, J. — Two cases are here submitted to us for decision. They are both against the same defendant, and, for the most part, involve the same questions. In each case, when it came on for trial, the defendant objected to the introduction of any evidence for the plaintiff, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objections were sustained, judgments entered for the defendant, and appeals prosecuted by the plaintiffs. The averments of the complaints, therefore, constitute the only subject for discussion in this opinion.

The complaint of the plaintiff, Clifton Wood Walters, sets forth that the defendant was engaged in the operation of machinery and apparatus for producing electricity, and supplying it to dwelling-houses in the city of Denver; that it had extended its wires to the house of Charles W. Walters, the father of the plaintiff, for the purpose of supplying light to that house; that it had attached to the house, near to and directly under the window, an electric device, called a converter, and near to and above the converter, and directly under the window, had placed two iron supports to hold glass insulators, to which were attached wires, connecting with the

house, and conveying the electric current for furnishing light to the house; that the defendant had carelessly suffered the wires to become uncovered and uninsulated; that the plaintiff, a child twelve years of age, who was residing with his father, upon looking out of the window, and seeing that one of the insulators had been removed from its iron support, and knowing nothing of the danger incident to his coming in contact with the wires attached to the insulator, seized hold of the insulator for the purpose of replacing it upon its support, and received a charge of electricity from the naked wire which his hands touched in seizing the insulator, resulting in serious and permanent injury to him. The objections to this complaint, stated in their logical order, are: First, that the facts alleged do not constitute negligence on the part of the defendant, within the contemplation of the law; second, that the complaint shows that the proximate cause of the injury was the act of the plaintiff in seizing the insulator, and not the exposed condition of the wire; and, third, that it appears upon the face of the complaint that the plaintiff was guilty of negligence contributing to his injury.

1. It is argued that there was no statute, ordinance or other express law which required the defendant to equip all of its wires with insulated covers, and that, therefore, taking into consideration the situation of this exposed wire, no duty rested upon the defendant to keep it insulated. We may concede that at places where there is no apparent possibility of injury ensuing from electric wires it would not be negligence to leave them uncovered, and that no duty to keep them insulated would exist unless it was imposed by some express law. But by this concession the question whether consistently with the degree of care exacted in the management of an agency so dangerous as electricity, it was or was not the duty of the defendant to have its wires insulated at the particular place where this injury occurred, is by no means disposed of. The wire in question was affixed to the outside of the wall of the house of the plaintiff's father, directly under one of the windows, and within the reach of persons looking out of the window. The plaintiff was a child, living with his father, and had the right to be in the house, and at the window. Upon seeing one of the insulators out of its proper place, and without knowledge or apprehension of the danger attendant upon his act, he undertook to replace the insulator, and so received an electric charge from the naked wire. The insulator was a harmless looking object. There was nothing to give notice of the deadly force hidden in the wire. The accident was one liable, and which the defendant must have known was liable, to happen at any dwelling to which electric appliances were similarly

affixed, and in which there were children, or persons ignorant of the purpose of the appliances, or the nature of the electric fluid; and we cannot say, as a matter of law, that proof would not be admissible, under the averments of the complaint, which would justify a verdict that in leaving the wire exposed as alleged the defendant was guilty of negligence. If such proof would be admissible, then the complaint, in so far as the charge of negligence is concerned, is sufficient.

2. The contention of the defendant is that the proximate cause of the injury was the act of the plaintiff in taking hold of the insulator. Certainly, his act brought him in contact with the naked wire, and, except for what he did, he would have suffered no harm. But we think counsel have fallen into some confusion respecting the legal meaning of the term "proximate cause," and possibly in dealing with the subject, there is a lack of desirable clearness in the language of some of the authorities. The responsibility of an agency for the production of an event is not necessarily dependent upon proximity in time. It is the logical relation between the two, whether they are immediately connected or not, by which the question of proximate cause is to be determined. Conditions subsequently coming into existence may set an agency in motion, but the event which results is the effect of that agency, and not of the intervening conditions; and, because the relation between it and the event is that of direct cause and effect, it is the proximate cause. Succeeding occurrences are merely the means by which it is brought into operation. In *Railroad Co. v. Bedell*, (Colo. App.), 54 Pac. Rep. 280, we had occasion to examine this question, and we reached the conclusion that the efficient and responsible cause was the proximate cause, without reference to its place in the order of events. Now, the injury to the plaintiff was the direct result of the escape into his body of a current of electricity from the naked wire with which he came in contact. If the wire had been protected, he would not have been hurt; and, in its uninsulated condition, the result would have been the same whether he had grasped it voluntarily, or had been involuntarily forced against it. The immediate cause was the electricity concealed in the wire, the discharge of which into the body of the plaintiff was brought about by the contact which took place between himself and the wire; and the contact was merely the condition which enabled the cause to operate. The question of the legal effect of the boy's act in reaching out to the wire is in no manner connected with the question of proximate cause. It can be considered only in an examination of the charge of contributory negligence.

3. It is maintained that the complaint shows such contributory negligence on the part of the plaintiff as to preclude a recovery by him. The question of negligence is a mixed one of law and fact, and, except in rare cases, its determination belongs to the jury. However, conduct may be so palpably imprudent and reckless as to leave no room for a difference of opinion concerning its character; and then, there being no facts to find, deliberation by a jury is unnecessary, and the court may apply the law directly to the case before it. But where, upon facts in its possession, the character of the conduct is in any degree involved in doubt, it is never proper for the court to withdraw the question of negligence from the jury. We do not think that from the statements of this complaint it can be said, as a matter of law, that the plaintiff was guilty of contributory negligence. He was rightfully in his father's house, and he was rightfully at the window. Seeing something out of place which was attached to the house, directly under the window, and within his reach it might very naturally occur to him to replace it; and his act in so doing, if he had no knowledge of the purpose of the attachment, and no reason to apprehend danger from it, could hardly be called recklessness. It might have been simply the result of an involuntary impulse to restore order where he found disorder, and to do something which he had no grounds for supposing he could not do with perfect safety. Under issues made upon the complaint, proof is admissible from which contributory negligence might be found, and under the allegations of the complaint proof is admissible from which a contrary conclusion might be drawn; and we do not conceive that we have the right to say that the averment of an act which upon issue joined may be interpreted for or against him by the evidence, amounts to an admission, conclusive upon him, that his own want of care contributed to his injury.

The complaint of Levina E. Walters, after setting forth the facts upon which negligence was charged against the defendant in substantially the language of Clifton Wood Walters' complaint, averred that she was the mother of Clifton, and that, upon learning that he was in a situation of danger, she went in great haste to his assistance, seized upon him to remove him from the wire, and received a charge of electricity which passed from the wire through the body of Clifton into her body, and that she so sustained the injury of which she complained. What we have heretofore said on the subject of negligence and on the subject of proximate cause is applicable here, and need not be repeated; but on the question whether her complaint shows contributory negligence in her, we think it well to venture a few observations. It is in voluntarily taking hold

of Clifton while he was still in contact with the wire, that the negligence is said to have consisted. She stated in her complaint that at the time she had no knowledge that her act would be attended by any danger to herself, but the allegation is unimportant, and might as well have been omitted. The instincts of a mother when she sees her child in distress will lead her to rush headlong to its rescue, without stopping to count the cost or measure the risk which she is incurring; and to say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind. The law is not the creature of cold-blooded, merciless logic, and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her as negligence, or at any time or in any manner used to her detriment. See Whart. Neg., sec. 308. We think that in each case the court erred in forestalling a trial, and both judgments are therefore reversed.

Reversed.

DALLEMAND V. SAALFELDT.

Supreme Court, Illinois, October, 1898.

ORDINANCE — UNINCLOSED ELEVATOR — DEATH OF EMPLOYEE CAUSED BY FALLING DOWN SHAFT. — Where a city ordinance required elevator shafts to be kept inclosed, and a servant of defendants, while operating an ascending elevator, fell from it through an uninclosed opening in the shaft to a floor, and from there back through the opening down the shaft to the basement, and was killed, the proximate cause of his death was the negligence of the defendants in failing to comply with the ordinance.

RISK OF EMPLOYMENT. — The deceased having been employed to wash bottles, the fact that he seemed to know how to run the elevator, and had run it a number of times, did not make that work an incident to his employment, nor did he assume the dangers incident thereto.

EVIDENCE — FAILURE TO INSTRUCT EMPLOYEE. — Evidence that the servant was nineteen years of age, and had been employed for seven weeks, and had received no instruction regarding the use of the elevator nor informed of the danger, will support a finding that he did not know the danger.

APPEAL from judgment, Appellate Court, First District (73 Ill. App. 151), affirming a judgment for plaintiff.

David Saalfeldt, a youth nineteen years old, was employed by appellants in their bottling works in the city of Chicago, to wash bottles. While thus employed, together with two other servants of appellants, in the basement of appellants' establishment, Cavanaugh, the foreman there, received an order from Casey, the foreman on the third floor, to send him (Casey) some bottles. The foreman shouted an order to the three bottle-washers to send some bottles to the third floor, without designating which of them should do it. Cavanaugh testified that Saalfeldt had no orders to send up bottles, but that there were standing orders that the two other men should send them, but Keating, the general manager, testified: "His duty was to wash bottles, clean them properly, and put them to drain. It was not his special duty to bring up and down bottles, but he did so at times. When he was asked to assist one of the foremen in taking a large load of bottles off, it was his duty to accompany the men. The bottles were carried in cases and barrels." Saalfeldt, however, put a case of bottles on the freight elevator, and went up, managing the elevator himself, and delivered the bottles to Casey on the third floor. He then returned to the elevator to go up and get some bottles, as he said, from the fifth floor, for Casey. Casey testified that he was looking at the elevator at the time, and in about half a minute after Saalfeldt started up saw him falling below the elevator down the elevator shaft. Saalfeldt fell to the basement, and was killed. The elevator stopped automatically a few inches above the fifth floor. No one saw Saalfeldt when he fell into the shaft, or testified how the accident happened.

At the time of the injury the following ordinances were in force in Chicago, and were given in evidence:

"Sec. 1571. Hoistways in which an elevator shall be used shall be constructed entirely of brick, from its lowest point, extending up through and six feet above the roof. All openings in such hoistway shall be protected by iron doors, and no wood shall be used upon the inside of such hoistways.

"Sec. 1572. Doors in such shaft shall be made of metal and the catches or fastenings upon such doors shall be so placed that they can be opened only from the inside of the shaft and entirely under the control of the elevator operator.

"Sec. 1573. All openings not having doors shall have metallic frames, with prismatic lights in iron frames."

"Sec. 1614. All doors in shafts of elevators shall have latches so contrived that a key shall be used to unlatch the doors from the outside, but may have a knob or handle to open the door from the inside."

“Sec. 1653. It shall be the duty of every person owning, controlling and operating or using as owner, lessee or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and operate the same and any such person who shall neglect to comply with the provisions of this section shall be fined the sum of \$10 for each and every day of such neglect.”

The doors to the elevator shaft were of wood, and could be opened either from the elevator side or the room inside. “In the basement and fourth and fifth floors were folding doors, working on hinges, and, including both doors, about six feet wide. The first, second and third stories had sliding doors the full width of the respective openings, and were operated by lifting or sliding up the door toward the ceiling, where it remained until pulled down. There was a bar across each door, from two and a half to three feet from the floor, which was attached by hinges at one end, and could be raised or lowered from either inside or outside the elevator. No particular person had charge of the elevator or its operation at the time of the accident, nor was any person employed by appellants for that special purpose.” The doors were kept open in the daytime. Eisen-drath, an architect, testified that the elevator carriage was in regular form of a freight elevator — “simply a large platform with the usual side-bars and cross-bars to hang the carriage on.” Saalfeldt had run the elevator up and down a number of times — one witness testified to a dozen times, and another testified that he manifested ability to handle it — but it did not appear from the evidence whether or not the proper and safer mode of using it had been explained to him, or whether he fully understood how to use or control it. The evidence tended to show that the deceased was an intelligent boy, sober, industrious, and careful. Appellee recovered a judgment for \$1,700. The appellate court has affirmed the judgment, and appellants have further appealed to this court.

MARCUS KAVANAGH and C. LE ROY BROWN, for appellants.

MOSES, ROSENTHAL & KENNEDY, for appellee.

CARTER, Ch. J. (after stating the facts). — The only error insisted upon by appellants is that the trial court erred in refusing to give to the jury the instruction asked by them, at the close of the evidence, to find the defendants not guilty. We are, therefore, called upon to decide whether or not the evidence, taken as true, and in its most favorable bearing in support of plaintiff's cause of action, with all proper inferences which might be justifiably drawn from it, was so insufficient to support the judgment that it should, for that reason, be set aside. Whether or not the verdict should

have been set aside as being against the weight of the evidence, is, of course, a question of fact which has been finally settled. We have to do only with the question of law.

It is not contended that the appellants were not in default in failing to comply with the ordinances of the city respecting elevators, but the first contention is that such default was not the proximate cause of the injury — that no causal connection is shown between such default and the accident to the deceased. It is plain from the evidence that, had the ordinance been complied with, and the doors to the openings been kept closed, the accident could not have happened. There was no opening between the platform of the elevator and the walls of the elevator shaft through which Saalfeldt could have fallen, and it is clear from the evidence that he must have fallen into the shaft from the open space at the doors after the elevator passed up; and, taking the evidence as true, this could have happened only at the fourth floor, and as Casey, who had charge of the work on the third floor, testified that it was only about half a minute after the elevator started up from the third floor that he saw the deceased falling down the shaft beneath the elevator, we cannot say, as a matter of law, that it was an unjustifiable inference for the jury to draw that Saalfeldt was in some manner caused to fall from the elevator into the open space at the open doors of the fourth floor, and from thence into the shaft beneath. As we understand the evidence, the platform of the elevator was supported by a framework of bars, but was not inclosed, and its entire front was open, and of the same width as the doors — six feet. There was a wooden bar across the open doors at the fourth floor, three feet and a half from the floor. These were double doors, eight feet and three inches high, and swung on hinges opening into the room. At the top, when closed, they fitted against or into the lower edge of the wooden partition or lining of the elevator shaft that extended up to the next opening. The operating cable was one foot from the opening. We are of the opinion that it would not have been, in the eye of the law, an unreasonable conclusion for the jury to reach, from the evidence, that the combination of these open doors, with the bar across them, and the horizontal edge of the partition projecting downward from above, were unsafe to one on the ascending elevator, and necessarily standing near the opening to work the cable; and when this condition of things, connected with the elevator, was maintained by the appellants in violation of the city ordinances, their negligence was sufficiently established. It seems not at all unreasonable that the jury should have found, not only that the defendants below were guilty of negligence, but that such

negligence was the proximate cause of the injury. Both were questions of fact, and it would have been error had the court given an instruction to the contrary.

The evidence shows that Saalfeldt was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, and as there was no eyewitness to the accident, and no countervailing evidence, the jury were authorized to find that he was, at the time of the injury, using due care for his own safety. *Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. Rep. 358. And as the record is made up we must assume, if such an assumption were at all necessary, that the court below instructed the jury that the plaintiff could not recover unless they believed, from the evidence, that at the time of the accident he was observing due care, for the record shows that, after the court refused the instruction to find defendants not guilty, other instructions were asked and given on behalf of each party, but they are not in the record.

So far we have a case where there is such evidence tending to prove that the injury complained of was caused by the neglect and default of the appellants, and while appellee's intestate was observing due care for his own safety, that the jury could, without acting unreasonably in the eye of the law, so find; thus making these questions of fact, and not of law. A more serious question is presented by the objection urged that Saalfeldt, as the servant of appellants, assumed the risk as one incident to his employment. The general rule of law on this subject is too well settled and understood to require comment or citation of authority, but whether a given case comes within the rule is not always easy to determine. As a question of fact it has, by the judgment of affirmance of the appellate court, been finally determined in this case that the risk was not incident to the duties which, by his employment, Saalfeldt undertook to discharge, or else that the facts were such as to bring it within an exception to the general rule; and we are concerned only with the legal question whether or not there was any evidence on which such finding could reasonably be based. The witness Keating, who testified that he was the superintendent of appellants' whole business outside of the office, further testified that Saalfeldt was employed to wash bottles in the basement, that he had no other duties, and that he had nothing to carry upstairs or downstairs as a part of his duties. Cavanaugh also testified that that was no part of his duties. There was no one employed for the special purpose of running the elevator, but there was evidence that Saalfeldt had run it a number of times, and appeared to understand how to run it. The jury were warranted in finding, from the evidence, that it was

no part of the duty of Saalfeldt to take cases of bottles up or down on the elevator, and that, therefore, the dangers attending that work were not incident to his employment, nor assumed by him by virtue of his contract of service with his employers.

But it is said that Saalfeldt volunteered to take the bottles up on the elevator without any order to do so by any one having authority so to direct, and that in so doing he voluntarily assumed the risk also. We agree with the appellate court that it was a question of fact for the jury whether or not Saalfeldt acted voluntarily in taking the bottles up on the elevator, or in good faith upon the order of Cavanaugh. Cavanaugh had charge over the men in that department, and gave the order to take up the bottles. Saalfeldt had done such work before, and had not been forbidden to do it. Cavanaugh, the foreman, did not specify which of the three men should obey him, and clearly the jury may have found that the order was addressed to the three men, to be obeyed by any one of them. Whether Saalfeldt properly acted in obedience to such order or not was clearly a question of fact for the jury, and not of law for the court.

It is, however, further contended that, whether the risk was incident to his contract of employment, and, therefore, one assumed by him, or whether it was incident to the special service which he undertook to perform in obedience to orders, the judgment is erroneous, because, it is said, he had knowledge of the condition of the elevator and its unsafe surroundings, and, having undertaken to perform it with such knowledge, he could not hold his employers, the appellants, liable. He had been engaged in his work for appellants from five to seven weeks. The evidence does not show that they ever gave him any instructions regarding the use of the elevator, or any information respecting the dangers to be guarded against in using it; and, in view of the facts and his inexperience and youth, it cannot be said, as a matter of law, that there was no evidence upon which a finding could be based that he did not have knowledge of the danger, or that the danger was not apparent. Whether or not the danger was apparent, or he had knowledge of it, were questions of fact. Besides, the burden of showing such knowledge was on the defendants below. 14 Am. & Eng. Enc. Law, 844. Again, if the fact was — and in support of the judgment, there being evidence to the point, we will assume the jury so found — that Saalfeldt performed this particular service by order of his employers, given through the foreman, and that it was outside the scope of his employment, then the risk would be one which he did not, by virtue of such employment, necessarily assume (2 Bailey, Mast. Liab., secs.

3476, 3502; 14 Am. & Eng. Enc. Law, 856, 857; *Linderberg v. Mining Co.*, 9 Utah, 163, 33 Pac. Rep. 692; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. Rep. 187), and in such case, although he had knowledge of the dangers attending the use of the elevator in its unsafe environment, he was not bound to disobey on pain of assuming the risk, but might perform the service, and hold his employers liable, unless the danger was such that an ordinarily prudent man would not encounter it (*Id.*; *Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. Rep. 876). However weak the plaintiff's case may have been upon the evidence, we are unable to find, as matter of law, that any fact necessary to a recovery has been found without evidence to support the finding. The judgment must be affirmed. Judgment affirmed.

BRAUN v. CRAVEN.

Supreme Court, Illinois, October, 1898.

FRIGHT — NERVOUS SHOCK — PROXIMATE CAUSE. — It appeared that the defendant was the landlord of plaintiff's sister and entered the house to collect the rent. He went into the room where the plaintiff was packing her goods prior to removal and said to her in a loud and angry tone and with a boisterous manner that if she attempted to move he would have a constable there in five minutes. Plaintiff was of a nervous temperament, but the landlord did not know of it, and she claimed that she suffered of a severe nervous shock which resulted in St. Vitus dance, and asked damages therefor. The landlord had a right to enter the house. *Held*, that it could not be said that defendant's acts were naturally and reasonably calculated to produce the peculiar injury sustained by plaintiff, and defendant was not liable (1).

APPEAL from judgment, Appellate Court (73 Ill. App. 189), reversing a judgment for plaintiff.

WILLIAM PRENTISS, RUSSELL M. WING and JAMES HECKMAN, for appellant.

PLINY B. SMITH and MORTON V. GILBERT, for appellee.

1. The court cited the following cases as holding that no action could be maintained for damages for injuries solely from fright or mental suffering: *Wyman v. Leavitt*, 71 Me. 227; *Railway Co. v. Trott*, 86 Tex. 412; *Railroad Co. v. Stables*, 62 Ill. 313; *City of Chicago v. McLean*, 133 Ill. 148; *Canning v. Inhabitants of Williamstown*,

1 Cush. 452; *Keyes v. Railway Co.*, 36 Minn. 290; *Renner v. Canfield*, 36 Minn. 90; *Mitchell v. Railway Co.*, 151 N. Y. 107; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Haile's Curator v. Railway Co.*, 9 C. C. A. 134; *Ewing v. Railway Co.*, 147 Pa. St. 40; *Phillips v. Dickerson*, 85 Ill. 11; *Allsop v. Allsop*, 5 H. & N. (Eng.) 534.

Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant; and it cannot be said that his manner, language, or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence; and, if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility, passing by, to sustain a nervous shock, productive of serious injury, might be held liable. Thus one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability. On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock. The appellate court held the language of the appellee, as disclosed by the evidence, was not such as could be held to constitute negligence, and that the injury sustained by appellant could not, according to common experience, be reasonably anticipated to result from such actions and language. We concur in that view, and the judgment of the appellate court for the first district is affirmed.

Opinion by PHILLIPS, J.

OFFUTT V. WORLD'S COLUMBIAN EXPOSITION COMPANY.

Supreme Court, Illinois, October, 1898.

EVIDENCE — BURDEN OF PROOF. — "A mere scintilla of evidence" means the least particle of evidence, and the rule that where there is such evidence tending to support the case of one who has the burden of proof it should be submitted to the jury, is not in force in Illinois.

MASTER AND SERVANT — SCAFFOLD IMPROPERLY FASTENED. — Where it appeared that the plaintiff, an experienced painter of sixteen years' standing, well acquainted with the hanging of ladders, was employed under direction of defendant's foreman, to attach a hanging scaffold, and after having fastened it in a certain manner was directed by

the foreman to attach it in a different way, and complied, though making objection thereto, stating that the hooks attached to the scaffold might be thrown out of the loops, but the foreman told him to do as directed, and on attempting to regain the middle of the scaffold, the hooks slipped out, and plaintiff was thrown off and injured, and he testified that the first way he fastened the scaffold was the usual and safe way, and that the other way was dangerous, and a fellow-servant corroborated him, an instruction to find for the defendant on the ground that the plaintiff had assumed the risk was erroneous.

ERROR to Appellate Court, First District. From a judgment (73 Ill. App. 231), affirming a judgment for defendant, plaintiff appeals.

HENRY D. BEAM, WILLIAM R. RUMMLER and ROBERT W. MCCULLOCH, for plaintiff in error.

JOHN A. POST and JOHN B. BRADY, for defendant in error.

CARTER, CH. J. — This was an action on the case to recover damages for personal injuries sustained by plaintiff in error while in the employ of defendant in error. At the close of the evidence for the plaintiff, the court, upon motion of the defendant, instructed the jury to find the defendant not guilty. The judge who sat in the trial having become one of the judges of the appellate court, and the other two judges being divided in opinion, the judgment was by that court affirmed, and the cause was then brought to this court on a writ of error, sued out by the plaintiff. The only question in the case is, did the court err in instructing the jury to find the defendant not guilty.

An instruction to find against the party upon whom rests the burden of proof, on the ground that there is no evidence legally tending to prove his cause, or, as it is now more generally stated, on the ground that the evidence, with all the inferences which the jury could justifiably draw from it, is so insufficient to support a verdict for such party that such verdict, if returned, must for that reason be set aside, is in the nature of a demurrer to the evidence, and, except as to technical methods of procedure, is governed by the same rules. The maker of the motion to so instruct admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it. The motion does not involve a determination of the weight of the evidence, nor the credibility of witnesses. *Bartelott v. Bank*, 119 Ill. 259, and cases cited; *Phillips v. Dickerson*, 85 Ill. 11; *Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. Rep. 15. It has been said in some cases that if there is any evidence, however slight, tending to prove plaintiff's cause of action, such an instruction would be erroneous, as it is the province of the jury, and not of the court, to pass upon the weight of the evidence, or its sufficiency in probative force, to authorize a verdict. In

Simmons v. Railroad Co., 110 Ill. 340, in delivering the opinion of the court, Mr. Chief Justice Sheldon said (page 346): "There may be decisions to be found which hold that, if there is any evidence — even a scintilla — tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff, that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Pleasants v. Faut*, 22 Wall. 120; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 332; *Railway Co. v. Jackson*, L. R. 3 App. Cas. 193; *Reed v. Inhabitants of Deerfield*, 8 Allen, 524; *Skellenger v. Railway Co.*, 61 Iowa, 714, 17 N. W. Rep. 151; *Martin v. Chambers*, 84 Ill. 579; *Phillips v. Dickerson*, 85 Ill. 11. In the recent case of *Frazer v. Howe*, 106 Ill. 563, this court recognized the rule to be: 'If there is no evidence before the jury on a material issue in favor of a party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative.' " This language was quoted in *Bartelott v. Bank*, *supra*, and Mr. Justice Schofield, in speaking for the court, said (page 272, 119 Ill.): "Since it was not intended in this case to overrule *Simmons v. Railroad Co.*, *supra*, it is apparent that evidence tending to prove means more than a mere scintilla of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party producing it. It is not intended by this practice that the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict and for a new trial upon the ground of the want of evidence to sustain the verdict. In neither case is the court authorized to weigh the evidence and decide where the preponderance is." See, also, *Siddall v. Jansen*, 168 Ill. 43, 48 N. E. Rep. 191, and *Rack v. Railway Co.*, 173 Ill. 289, 50 N. E. Rep. 668. It is clear, from the cases cited, and others, that what is called the "scintilla rule of evidence," is not in force in this state. Much confusion has doubtless arisen from the different meanings attached to the phrase "tending to prove," but giving it the meaning as held by this court in the *Bartelott Case*, above cited — that it is "evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff, or the party

producing it," — most of the apparent conflict between the different cases disappears. Thus, it was said by Mr. Justice Maule in *Jewell v. Parr*, 13 C. B. 909: "Applying the maxim, '*De minimis non curat lex*,' when we say that there is no evidence to go to the jury we do not mean that there is literally none, but that there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established." It is, of course, true that there are cases where there is literally no evidence in support of some material and necessary allegation, but there are many others where there may be some evidence tending in some remote degree to support every allegation, yet of too inconclusive and unsubstantial a character to be the foundation of a verdict. In either of such cases the court may, when the question is properly raised, so determine, and direct a verdict as in cases where there is no evidence. "A mere scintilla of evidence," if it means anything means the least particle of evidence — evidence which, without further evidence, is a mere trifle; and, as the law does not regard trifles, we see no reason why, on such a motion, the court may not adjudge such evidence insufficient in law, and direct a verdict as in cases where there is no evidence. As was well said in *Connor v. Giles*, 76 Me. 132, "there is no practical or logical difference between no evidence and evidence without legal weight." It is true that such motions are not to be regarded with favor. The province of the jury must not be invaded (*Frazer v. Howe*, 106 Ill. 563), and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. For a comprehensive review of this question, see 6 Enc. Pl. & Prac. 667, and 2 Thomp. Trials, 1595.

In the case at bar the evidence, in substance, was: That the plaintiff in error was a painter, who had worked at his trade for upward of sixteen years. That he was a first-class workman and thoroughly understood the hanging of ladders and the putting up of scaffolds. That he had been working in the World's Fair buildings for ten months before the accident occurred, on February 18, 1893. At that time he was employed by the defendant in the color department, working in the Machinery Hall Annex. Thomas Hunt had charge, for the defendant, of that building, and of all the men employed there in painting, and was foreman over the plaintiff. Plaintiff was ordered by Hunt to help put up a hanging stage or scaffold close to the ceiling, about seventy feet above the floor, near the west wall of the building. After having put up and fastened to a cross beam the ropes to which was to be hooked the pulley to support the east end of the scaffold, he climbed up an upright beam, on

which cleats had been nailed, to the rafter, and put a strap, or strop (which is a piece of flat rope, with the two ends spliced together, forming a loop or link) around the rafter, and put one end of the loop through the other end, forming a noose around the rafter, and hooked the pulley into the single loop, whereupon the foreman called to him from below, and directed him not to put it up that way, but, with the double rope over the rafter, to place both ends in the hook to the pulley; the object being to put up a line, so that the whole arrangement, when the work should be finished, could be jerked loose by standing on the floor. Plaintiff objected, and told Hunt that the hook was not big enough for that purpose, and that the strap, being "brand new," was "liable to come down." Hunt replied that it would not come down, and repeated his orders; and Offutt obeyed, and fastened the strap as directed. Hunt and one Wagner, who had been working with Offutt, then brought a stage or scaffold, and with the pulleys pulled it up to plaintiff, who told them at the time that it was too short for the place, and was liable to throw the loop out of the hook. The foreman told him it was all right, and to fasten it up. The plaintiff then fastened the west end, and crept on his hands and knees over the scaffold to the east end, and fastened that end; and while he was crawling back to the west end to come down for orders, and when near the center, the stage commenced to swing endways, on account of its being too short, and the ropes fastening it at each end hanging at an angle, instead of straight down; and the strap or rope slipped out of the hook at the west end, and plaintiff was precipitated to the floor below, and was seriously and permanently injured. He testified that the way he first fastened the strap and hook was the proper, usual, and customary way, and that it was safe, and that he thought that the way the foreman told him to do it was the wrong way. Wagner testified that sometimes a sling was used single, and sometimes double; that it was often used double; that it was safer single, in his judgment, because the hook had a firmer grip on it; that it was not considered proper in the trade to have the loop double, but that straps had been put up with the hook into the double loop quite frequently there.

Counsel for defendant call our attention to a certain written statement alleged to have been signed by the plaintiff when he was under treatment in the hospital, and which it is said varies from the testimony given by him upon the trial. But that question relates only to the credibility of the witness, and the weight which should have been given to his testimony by the jury, had the issue been submitted to a jury, and does not arise in considering the alleged error of law in instructing the jury to find for the defendant.

It is also insisted that the evidence showed that, if there was any negligence of the defendant, it consisted in the negligence of the foreman, Hunt, when he was acting as a fellow-servant with the plaintiff in the same line of service. This is also a question of fact, with the evidence strongly tending to prove the contrary. The evidence tends to prove that Hunt was acting as foreman representing the common master, and in that capacity gave specific orders to the plaintiff to perform the very act which caused the injury; and, as the case is presented here, we must, of course, so assume.

The next contention is that it appears from the testimony given by plaintiff himself that he knew that it was unsafe to place the double loop through the hook, and to use the short stage or scaffold sent up to him, as he was ordered to do by the foreman, and that, having knowledge of the danger likely to result from his compliance with the foreman's demands, he should, acting prudently, have refused to obey, and that, failing in this, he was guilty of such contributory negligence as precludes recovery on his part. Under the evidence it cannot be assumed, as a matter of law, that the danger was so imminent that no man of ordinary prudence having knowledge of it would incur it. The rule is that, where the servant is injured while obeying the orders of his master to perform work in a dangerous manner, the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it. *Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. Rep. 876, and cases cited; *Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. Rep. 572; *Railroad Co. v. Dwyer*, 162 Ill. 482, 44 N. E. Rep. 815. Under the evidence in this record, it would seem clear that it was a question of fact for the jury to determine whether the danger was of the character mentioned, and whether the plaintiff knowingly incurred it. The mere fact that he did not regard it as safe to fasten the hook over the double loop, and that the usual, customary, and safer way was to attach the hook to the single loop, with a noose over the beam or rafter, and that he regarded the stage or scaffold as too short, but performed the work as specifically directed by the master, was not, under all of the circumstances of this case, such proof as to authorize the court to say to the jury, as a legal proposition, that the evidence with all justifiable inferences to be drawn from it, was insufficient to authorize recovery. There was evidence that loops were sometimes hooked in that way by those engaged in similar work. The servant was under the evidence, acting under the specific directions of the representative of the master, and was required to attach the loop in a particular way for the convenience of the master, so that the scaffold and ropes might be detached from their

fastenings from below, and the necessity of climbing up and unloosing them from the rafters avoided. The plaintiff was not required by law to disobey his master, or by obeying assume the hazard of obedience, unless the danger was so imminent that an ordinarily prudent man would not incur it. Besides, the plaintiff was not injured while using the scaffold as a place upon which to stand while engaged in painting, but was injured while in the act of adjusting it in obedience to orders, and before he could leave it for a place of safety. It would be an unjustifiable inference to draw, as a legal conclusion, that the plaintiff knew or ought to have known that the danger was so imminent that the scaffold would fall before he could leave it and climb down to the floor below. These are questions of fact which should have been submitted to the jury. The judgment is reversed, and the cause remanded to the circuit court.

Reversed and remanded.

KELSEY v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court, Iowa, October, 1898.

SWITCHMAN INJURED WHILE RIDING ON PILOT OF ENGINE — In an action for injuries sustained by a locomotive fireman it appeared that while he was standing on the steam chest of the engine, adjusting the cap of the "peep hole" he saw a signal given which indicated in a general way that the engine was to back quite a distance and he stepped down to the pilot beam intending to go around into the cab as soon as the engine, which started when the signal was given, had stopped. Instead of the engine going a distance, it moved only one or two car lengths when the cars which the engine was backing struck those that were to be coupled and the fireman who was stooping forward to grasp the flagstaff was thrown to the ground by the shock and injured. There was a handrail and footboard by which he might have returned to the cab on the engineer's side, and there was a brace from the pilot beam to the front of the boiler by which he could have steadied himself. His excuse for not going in on the engineer's side was that the cab window was fastened inside and the engineer was busy. *Held*, that the fireman could not complain that the kind of signal given was negligence, and that he was guilty of contributory negligence (1).

APPEAL from judgment, District Court, Clinton County, entered upon court directing a verdict for defendant.

1. In *YOUNG v. BOSTON & MAINE R. R.* (*Supreme Court, New Hampshire, July, 1898*), which was an action for injuries sustained by a switchman by being struck by a switch engine that he attempted to get on, and that was provided with a pilot instead of a step and rail, the court held that he assumed

HAYES & SCHUYLER and BARKER & MCCOY, for appellant.

HUBBARD & DAWLEY, for appellee.

GIVEN, J. — 1. The grounds of defendant's motion for a verdict were that there is not sufficient evidence to sustain a finding that the defendant was guilty of the negligence alleged, and that the evidence shows without any dispute that the plaintiff himself was guilty of negligence which directly contributed to his injury. Plaintiff was at the time he was injured, and had been for over three years, in the employ of the defendant as a locomotive fireman, and was familiar with the duties of a fireman and the manner of making up and moving trains of cars. On the night of June 24, 1893, the engine upon which he worked was engaged in making up a train of freight cars in the yards at Clinton, preparatory to running west. As was his duty, the plaintiff had lighted the headlight and sidelights on the front of the engine before it was brought from the roundhouse. After setting out some cars, the engine, with eight or ten cars attached, was moving to a point west of Fifth street, where it stood for a time, headed west. The next thing to be done upon signal was to back the engine and eight or ten cars attached thereto eastward, and to couple to the other cars composing the train. While the engine was thus standing still, the plaintiff got down from the cab on the north or right-hand side, and passed around to the front of the engine, to see if the lights were burning properly, and, in doing so, discovered that the cap to what is called the "peep hole" was not in proper position. It appeared that this cap is removed when the engines are being cleaned in the roundhouse, and that it is the duty of the fireman to see that it is in place when the engine is brought out, because, if not in place, it affects the draft, and impedes the generation of the steam. Seeing that the cap was not closed as it should be, the plaintiff went upon the front part of the engine, and, standing upon the steam chest, tightened the cap, and, while doing so, observed a signal given by some one in the rear of the train, for the engine to back east, so that the coupling could be made. The engine and cars attached were promptly moved backward, and, while moving, the plaintiff stepped from the steam chest to the bulkhead of the engine, and was moving, stooping down

the risk of the employment by continuing in it with knowledge of the increased hazard and that he was guilty of contributory negligence as having set a switch in order merely to save himself the labor of walking some fifty or seventy-five feet to the cars or of getting on the rear of the engine, or

into the cab, he deliberately stepped between the rails and as the engine approached him at an unknown rate of speed, he voluntarily took the chance of stepping or jumping onto the pilot, his foot slipped off and he was rolled along the track and injured.

to get hold of the flagstaff to balance himself, with the view to getting off the engine at the front, and passing around to the entrance of the cab, while in that position, the standing cars were struck by the moving cars, and the plaintiff thereby thrown from his position on the bulkhead to the ground, and quite seriously injured. There was a footboard with a handrail extending from the cab to the front of the engine, by which the plaintiff could have, after adjusting the cap to the peep hole, returned to the cab in safety. He gives as a reason for not doing so that the cab window was closed, so that it could only be opened on the inside, and that the engineer was busy at the time. It also appears that there were two large iron braces in front of the engine, one of which was within easy reach of the plaintiff when on the bulkhead. The evidence shows that, in signalling for such movements different signals are used, so as to indicate the distance to the point of coupling. Plaintiff describes the mode of signalling as follows: "If you want to move to a position, a swinging motion of the lantern means to back up. If it is quite a distance, they will give a quick signal, and sometimes a long signal. As a general thing, they give a fast signal. If you get a fast signal, you have a good distance to go. In getting that, you expect to go eight or ten car lengths. If it is only one or two car lengths, you get a little jerk. If it is two little jerks or three little jerks, you are to know that it is that number of cars, or the front of the train is to move that far." Witness describes it as follows: "If the distance was short, they could give a slow easy signal, and, when they were about to strike, they would hold their lamps still, indicating they were pretty near there. In giving this round motion, there was a difference in the sweep of the signal to indicate a long distance or a short distance between the cars to be coupled. A quick motion, that there was quite a distance to go. The slow motion would indicate that you didn't have so far to go." Mr. O'Donald says: "If you want a train to back up, if they have a good distance to go, they give a big signal, the wide swing of the arm, a good big swing, so they know there is quite a distance to go. And, if it is a short distance, they move the lamp slowly. These signals are given for the purpose of regulating the working of the engine and the working of steam upon the engine." Plaintiff says: "The man was on the side of the train, and gave a signal, swinging round with the full length of the arm. It was a quick long signal and signified that we had quite a long distance to go before we came to the rest of the train." He further states: "At the time I saw the signal, we had gone back not over a car and a half. I stepped onto the pilot, and stooped over, and, before I could get hold

of the flag standard, they struck. I was going to sit down, instead of jumping off in the night-time, until it struck." Again he says: "It was while in the act of stooping over, and before I got down far enough to take hold of anything, that they struck and knocked me off. I did not take hold of this brace on the front end, that is down by the pilot beam. There was nothing between it and me. We never get hold of that even when the engine is going when we let go of the handrail."

2. There is no evidence whatever to support the charge that the engine and cars attached thereto were suddenly, too rapidly, or unskillfully moved against the standing cars, nor that there was any negligence in having the standing cars on the track where they were. The only indication of negligence upon the part of the defendant's employees was in the kind of signal given, or, in other words, that the signal given indicated a longer distance to the point of coupling than should have been indicated. The signals only indicate in a general way the distance to be passed, and the employee giving that signal did not know, and had no reason to expect, that the plaintiff was in a place of danger, as he was. The signal was for the government of the movement of the engine and cars attached, and seems to have accomplished that purpose in a proper manner. We have not set out the evidence in full on this subject, but sufficiently so, we think, to show that there was no negligence in the giving of the signal of which the plaintiff has a right to complain.

3. Knowing, as the plaintiff did, that the engine and eight or ten cars were being moved backward, and that in a very brief time they would come in contact with the standing cars, we think it was manifest negligence on his part not to have returned to the cab by way of the running board, where the handrail would have protected him from danger. It was not a sufficient excuse for going as he did that the engineer was busy at the time, and that the window would have to be opened from the inside. It was the way of safety, and he should have taken it. He testifies: "I knew what we were backing up for. I knew the cars were coming together afterwards. I knew that we would not expect to find them in less than eight or ten car lengths. I didn't know the exact distance. I expected them to back until they struck or reached the other cars. That is the reason that I started to sit down on the pilot beam, and got thrown off because they came together sooner than I thought they would." He failed to protect himself by taking hold of the brace or flag standard, as he could have done. The plaintiff has no reason whatever to assume that the impact of the cars would be a few seconds

later than it was, and he was unquestionably guilty of great negligence in putting himself in that place of danger under the circumstances then known to him.

We are in no doubt that the motion for verdict was properly sustained, and the judgment is therefore affirmed.

NEET V. BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

Supreme Court, Iowa, October, 1898.

TRESPASSER ON TRAIN FALLING AND RUN OVER BEFORE IT WAS STOPPED — NEGLIGENCE OF TRAIN EMPLOYEES. — Where it appeared that a boy seventeen years of age not in the defendant's employment and having no right there, jumped upon the rear platform of a moving freight train and soon after, while the train was backing, was thrown by the motion of the train to the track in front of it, and was in some manner caught and carried 254 feet before the train was stopped, and both legs were crushed, and the evidence was conflicting as to whether he was run over immediately after falling upon the track or just before the train was stopped, and whether the train hands were informed of his position, and it appeared that the train could have been stopped within a hundred feet at any time, the question whether the injury might have been prevented by the exercise of reasonable care after the discovery of the injured person was for the jury.

APPEAL from judgment, District Court, Grundy County, in favor of plaintiff.

S. K. TRACY, for appellant.

WILLIAMS & KERN, and BOIES & BOIES, for appellees.

LADD, J. — The only question presented is whether the verdict is sustained by the evidence. As a freight train, consisting of twenty-three loaded cars, one empty, and the caboose was passing the depot at Rhinebeck, in a southeasterly direction to a point beyond certain switches, William Neet jumped on the platform of the moving caboose. After passing the switches, the train stopped and backed on the passing track in a northwesterly direction. The head brakeman, Jordon, signaled the engineer to stop, and undertook to pull a pin so as to uncouple the rear cars. This pin was wedged in by cinders so that it could not be readily pulled, and the train, in taking up a slack, caused the caboose to jerk, and threw Neet from the platform of the caboose back on the track. He was caught in some way, and carried back 254 feet before the train was stopped. The wheels of the truck ran over both legs, causing injuries which

resulted in amputation. He was but seventeen years old, not in the employment of the defendant, and had no right to be on the train. It is not claimed that the defendant is responsible for injuries occasioned by the fall, or which resulted to him immediately afterwards. Indeed, recovery is based on injuries, if any, to him after the train had moved back, subsequent to his fall, 150 feet. The charges of negligence are 1, that the brakeman failed to exercise ordinary diligence in stopping the train after being informed of Neet's perilous situation, and 2, that the head brakeman failed to give the engineer the emergency signal upon being so informed, and that, had such diligence been exercised, or signal been given, the train would have been stopped in time to have avoided the injury. Was there any evidence sufficient to go to the jury upon these two charges of negligence? The defendant insists that the evidence conclusively shows that the wheels ran over the legs immediately after Neet's fall. Neet testified that he fell inside of the rails, immediately turned over on his hands and knees, and was caught in the back through his clothing by a rod just back of the first brake-beam, from which he was torn loose when his legs were run over, and that he paddled along on his hands until the train was stopped. A scar on his back, and the condition of his clothing tended to confirm this story. He also said the wheels ran over his legs just before the train stopped. Davis saw the boy fall, and observed him struggle to keep his legs from under the wheels. Clifford was not positive, but thought his feet fell inside of the rails. On the other hand, Randall testified that the boy fell with his feet over the rails, and that his legs were run over immediately. Gibson is unable to say whether his legs fell across the rails or he threw them there, but is positive that they were run over before the cars had moved ten feet. Barr, the conductor, felt the jar of the car wheels as though rising and going over something. All that can be said concerning this evidence is that it was in conflict. If the jurors believed Randall and Gibson, or relied upon the inference to be drawn from the statement of Barr, they might well have found that the injury occurred within the 150 feet mentioned in the petition. But if they relied upon the testimony of the party injured, somewhat corroborated by other witnesses, then they might well have found that the injury occurred shortly before the train stopped. When Neet was taken from under the cars it was found that a small portion of his trousers on the right leg was caught between the brake shoe and the wheel—enough to carry him along. It is said that, because the brake was set immediately after his fall, his pantaloons must have been caught at that time. If so, then this physical fact is conclusive that

he was injured within the 150 feet, as the conductor set this brake immediately after his fall. But it is shown that brake shoes raise and lower when set hard if the train is in motion, so as to leave a little space between the shoe and the wheel. It is possible, then, that the clothing was caught after the brake was set. If before, owing to the loosening of the shoe, the cloth might have worked out. As, in backing, the wheel would naturally draw or carry everything next to it up to the end of the brake shoe, the cloth might have been caught after the brake was set. This would be more likely to occur after the wheel had passed over, as the jar would tend to raise the brake, and the mashing of the leg within the cloth would tend to hold that close to the wheel. We cannot say, from the record before us, whether the trousers were caught when the brake was set or at a time subsequent. It was a circumstance to go to the jury to aid in arriving at a just conclusion. But it is said that the brakeman knew nothing of the accident until the train had stopped. Both of them so testified. Mitchell testified that he heard Strong, one of the brakemen, tell Jordon not to pull the pin, as there was some one under the train; that then the train had moved but a car's length after Neet's fall, and that the brakemen made no effort to stop it by setting brakes or otherwise. Davis testified that he saw the accident; called to the brakemen, who were up towards the engine; ran and told them that a man was under the train, when they gave signals, but made no other effort to stop it. The engineer said that he received no emergency signal, but, if he had he could have stopped the train within a car's length. It was moving slowly when Davis went to where the brakemen were, and he says that between the time of the fall and when he informed them of Neet's peril, it had moved about fifteen feet. As he was forty feet beyond the caboose, and the train about eight hundred feet long, we take it that his estimate of the distance the train had moved is not reliable. It is said that no man with feeling would have refused to stop the train, but such an omission may result from a mistaken conclusion that all possible injury has been done. It should be added both brakemen deny receiving any information from Davis. No pressure was being applied by the engine, and by the application of brakes the train could have been stopped within 100 feet. The mere statement of the evidence shows the issue was for the determination of the jury.

Again, it is argued that the injury to Neet was so immediately connected with his own negligence in jumping upon the train, and the fall therefrom, that he cannot recover. It is settled in this state that, even though the plaintiff was negligent, if the defendant,

knowing this, might have avoided injury by the exercise of reasonable care, and failed to do so, recovery may be had. *Benton v. Railroad Co.*, 55 Iowa, 496, 8 N. W. Rep. 330; *Morris v. Railroad Co.*, 45 Iowa, 29; *Sutzin v. Railway Co. (Iowa)*, 63 N. W. Rep. 712; *Orr v. Railway Co. (Iowa)*, 62 N. W. Rep. 851; *Ford v. Railway Co. (Iowa)*, 75 N. W. Rep. 650. In *Ferguson v. Railway Co. (Iowa)* 69 N. W. Rep. 1026, it was held that the evidence did not warrant the finding that the employees of the defendant had knowledge of Ferguson's peril.

We conclude that the evidence was such as to warrant the submission of the issue to the jury, and the judgment is affirmed.

MISSOURI PACIFIC RAILWAY COMPANY V. PREWITT ET AL.

Supreme Court, Kansas, November, 1898.

CHILD ON RAILROAD TRACK RUN OVER BY TRAIN. — The employees of a railroad company, operating a passenger train, on schedule time, at a point where the presence of trespassing children is not to be suspected by them, who perceive a small object upon the track, of a nature they do not understand, but which they have no reason to believe, from its appearance, or any of the circumstances of the case to be a child or any living thing, or anything of substantial value, which can be injured, or do injury to the train or passengers, are not required to stop or slow up until its nature can be ascertained by them; and if it be a child, but the fact is undiscoverable by them until too late, with approved machinery and appliances, and the exercise of the highest skill and effort upon their part, to avoid injury to it, they will not be considered negligent.

(Syllabus by the Court.)

ERROR from Court of Appeals, Southern Department, Central Division.

From a judgment of Court of Appeals (51 Pac. Rep. 923) affirming a judgment for plaintiff, defendant appeals.

J. H. RICHARDS and C. E. BENTON, for plaintiff in error.

SHINN & KNOWLES, for defendant in error.

DOSTER, CH. J. — This was an action to recover damages for the death of an infant, two years and four months old, caused, as alleged, by negligently running upon and over it with a train of cars. A verdict and judgment for \$550 were rendered for plaintiffs in the trial court. Upon proceedings in error to the Court of Appeals the judgment was affirmed. 51 Pac. Rep. 923. The case has been

ordered here for review. The only question necessary for consideration arises upon the special findings of the jury as to the circumstances of the accident. Such of the findings as are most material to this question are as follows: "1. Did the engineer when he discovered an object upon the track make any effort to slacken the speed of his train, so that it could be stopped, if necessary, before passing over the object? A. Not when he first discovered the object. 2. Could the engineer have stopped the train before striking the child, had he taken such measures as were in his power at the time he first discovered the object on the track, and before he knew and recognized it to be a child? A. Yes. 3. Were the engineer and fireman in doubt as to the nature of the object when they first discovered it upon the track, and until they recognized it as a child? A. Yes. 4. How far was the said Bertie Prewitt from any public highway or crossing at the time of the accident? A. About 147 rods. 5. How far was the house in which the plaintiff and said Bertie Prewitt lived from the place where the said child was injured? A. About forty-seven rods." "10. Is it not true that, when the engineer in charge of the engine first discovered the object which afterwards proved to be the said Bertie Prewitt, he believed that said object was a piece of paper or weed which had blown upon the track? A. No. 11. Is it not true that, when the engineer first discovered the object which afterwards proved to be Bertie Prewitt upon the track, that he believed it to be something that could not be injured, and which would not endanger his train or the passengers upon it? A. Yes. 12. Prior to the time that the engineer or fireman discovered that the said object was a child, did they, or either of them, believe, or have any reason to believe that a child might be upon the railway track at that point? A. No. 13. Is it not true that from the time the said object was first discovered upon the track by the engineer and fireman, up to the time when they discovered that it was a child, both said engineer and fireman believed that it was a piece of paper or weed, or something of that character, which could neither be injured nor do damage to the train? A. No." "15. Was the place where said Bertie Prewitt was injured a place that was frequented by children, or where children were in the habit of playing or being? A. No. 16. From the time the object which afterwards proved to be Bertie Prewitt was first discovered by the engineer or fireman, did the said Bertie Prewitt move, or give any signs of life which could be noticed by either the fireman or engineer? A. No." "19. Did either the engineer or fireman, prior to the time they, or either of them, discovered that said object was a child, have any idea that it was any living thing?

A. Yes." "52. Does not the evidence show that the child was at and before the time it was killed, lying motionless on the southern slope of the surfaced earth, between the rails? A. Yes. 53. Does not the evidence show that, when the engineer and fireman first discerned the child, they did not know what it was, but thought it was a paper or weed? A. Yes. 54. Does not the evidence show that neither the engineer nor the fireman knew that it was a living creature until after the engineer asked the fireman what it was, and just prior to the time that he reversed his engine and applied the brakes. A. Yes. 55. Does not the evidence show that if the engineer had doubt at all as to what the character of the object was, up to the time that he discovered that it was a child, and the time when he applied the brakes and reversed his engine, he had no thought that it was a child or human being? A. Yes. 56. Does not the evidence show that, as soon as the engineer discovered it was a child, he did everything in his power to stop the engine and train and save its life? A. Yes." "58. Is it not true, as established by the evidence, that the train was equipped with the best modern appliances, and with what is known as the 'Westinghouse Improved Air Brakes,' for the stopping of the engine and train in cases of emergency, and that they were in good working order at the time of the accident? A. Yes. 59. Is it not true that the engineer in charge, Peter Lahey, was above the average engineer, in sobriety, good habits and skill? A. Yes. 60. Does not the evidence show that at the time of the accident the engineer was in good health, and in full possession of all his faculties? A. Yes. 61. Does not the evidence show that the fireman, Leroy Ligitt, was a skilful fireman and a man of good habits, and faithful in the discharge of his duty? A. Yes; according to testimony." Other findings not important to set out in full, disclose the fact that a ditch and a hedge fence, with an opening in it, intervened between the house of the child's parents and the place of the accident.

From all these findings it would appear that the child had wandered from the care of its parents to the railroad track, and had laid down 147 rods from any public highway crossing, and was probably asleep at the time of its death. Such cases greatly move the sympathies, and incline us all to try to find for the stricken parents some balm to assuage their grief. The law, however, will not impose penalties upon an innocent cause of human sorrow, however poignant the suffering may be. Do the findings show fault upon the part of the railroad company through the negligence of its employees? The findings numbered 10 and 53 would appear to be contradictory, as to what the engineer thought the object on the track

was when he first discovered it. So far as the fact inquired about, and concerning which answers were made, is involved in the substance of the case, a claim of reversal might be founded upon these contradictory findings. We will not, however, base our judgment upon any theory of inconsistency in the findings, but upon the substantial facts of the case disclosed by them as a whole. These substantial facts were that the child was not run upon at a public highway crossing, nor at a place frequented by children, and that there was nothing in its appearance to indicate to the enginemen that it was a human creature, or any living thing which could be injured, or do injury to the train or passengers, until it was too late to avoid running over it. In view of such fact, can the railroad company be rightfully accused of negligence? We feel sure that it cannot. Regard must be had at the outset, in the consideration of such cases, to the duties resting upon railroad companies as public carriers of passengers and property, and to the manner in which those duties must, of necessity, be discharged. Trains must be run upon schedules of time. They cannot conform to the schedule, if obliged to stop at the appearance upon the track of all objects, the nature of which is only discernible upon near approach. Rags, papers, weed, fowls, and small animals are perceived and run over between all the stations, in the travel of a train. To stop or even to slow up at the sight of all these objects would entail upon the trainmen a consumption of time and a degree of carefulness which would make the business of railroading a difficult, burdensome, and unsystematic one indeed. The obligations resting upon railroad men in the operation of trains rise or increase, of course, with the thickening or increase of warning circumstances of peril. So they do in all human affairs where dangerous agencies are employed. The failure to rise in care and diligence to the height of a dangerous occasion, as indicated by circumstances, is negligence. If, however, no circumstances indicating danger are known or perceivable, though they really exist, it cannot be said that negligence has occurred. In this case, had the object perceived by the trainmen been at a highway crossing, where the presence of small children might be suspected, or had it been at a place frequented by them for play, near a school house, or in or on the outskirts of a village, the case might be different. A railroad company owes some duty to trespassers. It must not wantonly run its trains upon them, even though they be trespassers. It must have a care for them at places and under circumstances where trespassing is liable to occur, but it does not owe to them, however guiltless of intelligent wrong conduct they may be, to care for them in out of the way and unusual places, unless signs and circumstances

indicate their presence. It would extend this opinion to an unnecessary length to enter upon and carry through an analysis of the above quoted findings, to show that negligence upon the part of the railroad company is not disclosed by them. Synthetically considered, they show the opposite of negligence, or rather show that no circumstances calling for the exercise of diligence upon the part of the trainmen to avoid the accident were known to them, or were in reason to be apprehended by them. They show engine, machinery, and appliances of approved pattern and good working order. They show that the engineer and fireman were men of skilfulness, sobriety, faithfulness in the discharge of duty, and in possession of all required faculties. They show that the place of the accident was not one where small children would reasonably be expected. They show, indeed, circumstances making it unreasonable to suspect the presence of small children at such place. They show that, prior to the time when the enginemen discovered that the object on the track was a child, they did not believe or have reason to believe it was one. They show that, when the enginemen first discovered the object on the track, they believed it to be something that could not be injured, and which would not endanger the train or passengers. They show that, as soon as the enginemen discovered the object upon the track to be a child, they did everything in their power to stop the train and save its life. They do, however, show, as contended by defendants in error, that the enginemen were, for a time after their discovery of the object upon the track, and up to the time they perceived it to be a child, uncertain as to its character; but the fact is collectible out of all the findings, and expressed in some of them, that the trainmen had no reason to believe that the object was a child, nor even a living creature, until, as stated in finding 54, just prior to the time the engineer reversed his engine and applied the brakes, and that practically up to that time he did not believe it to be anything that could be injured, or which would injure the train or passengers. Upon the facts as disclosed by the findings quoted, the Court of Appeals ruled the law to be: "The duty of an engineer in charge of a passenger train, when he discovers an object upon the track, the nature of which he does not understand, is, if possible, to bring his train under control, until the nature of the object is known, that he may be able to stop, if necessary to prevent injury." We do not assent to this statement of the law. It leaves out of consideration the element of reasonable belief, from the circumstances of the case, that the nonunderstandable object was a human being, or something of substantial value, which could be injured, or which would do injury to the train or passengers. As

stated before, there is no duty resting upon the men in charge of a train to stop or slow up at the sight of every object upon the track, the precise nature of which cannot be understood, unless it be such as, from its appearance and the surrounding circumstances, is of a character to indicate danger either to the object or to the train. There are some cases which give countenance to a contrary rule, but the most of those cited by counsel for defendants in error disclose facts which render them dissimilar to this one. The great weight of authority is to the contrary of the view taken by the District Court and the Court of Appeals. The case of *Railway Co. v. Todd*, 54 Kan. 558, 38 Pac. Rep. 805, was an action to recover damages for the death of a boy between nine and ten years of age, and this court say: "He was in a place where the company had the exclusive use of the tracks, and where there was no reason to anticipate that intruders or trespassers would be concealed. Under such circumstances, there was no duty on the part of the company to foresee his wrongful presence, nor did any duty arise in his favor until his presence was discovered. As a general rule, before the company can be made liable for injury to trespassers it must appear that the proximate cause of the injury was the failure of the company to use reasonable care to avoid injury to them, upon becoming aware of the peril to which they were exposed. * * * The only duty which the company owed to him was not to recklessly or wantonly run over him after they discovered him in a place of danger." The case of *Chrystal v. Railroad Co.*, (N. Y. App.) 11 N. E. Rep. 380, was an action against a railroad company to recover damages for running over and injuring a child seventeen months old. The negligence relied on by plaintiff was the failure of the engineer to discover the child upon the track in time to stop the train. It was claimed that he might have seen the child sooner, but the court held that there could be no inference that the engineer could have seen the child sooner than he did, and that plaintiff was not entitled to recover. In the opinion the court say: "But there can be no doubt, upon this evidence, that, after the engineer discovered that the child was in peril, he did all he could to arrest the motion of his train. That he wilfully or recklessly ran upon him after he discovered that he was in peril is inconceivable, and certainly cannot be assumed. An engineer is not bound to stop his train the moment he sees some living object upon the track. He has the right, in broad daylight, when his train is perfectly visible, and its approach must be heard and known, at least in the first instance, to assume that the object, whatever it is, will leave the track in time to escape injury. He is not bound to expect helpless infants upon

the track, without sufficient knowledge or ability to escape when warned of danger. He could not know when he first saw the plaintiff that he was too young to be conscious of the danger to which he was exposed; and, without the imputation of negligence he could run on until he discovered that he was heedless of the danger. Reasonable care in the management of trains, which must make their time between stations, and have the right of way, does not require more. The defendant is not responsible for an error of judgment, if there was any, on the part of the engineer as to the speed of his train, the distance, age, and peril of the child, and his ability to stop the train in time to protect him. All the engineer was bound to do after the discovery of the peril was to use reasonable diligence and care to avert it, and there was no evidence which authorized the jury to find that he did not do this." The opinion of the Court of Appeals is disapproved, and the judgment of the District Court is reversed with directions to enter it, upon the findings, for the defendant, instead of the plaintiff, in that court. All the justices concur.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. PARKS.

Supreme Court, Kansas, November, 1898.

MASTER AND SERVANT — ENGINEER BLOWING WHISTLE OF STANDING ENGINE AND HORSES FRIGHTENED AND RUNNING AWAY. —

1. In order to render the master liable for a wrongful act of his servant, it must appear that the act was done either at the master's command, or in connection with the performance of some service or the transaction of some business for him. But an engineer in charge of an engine, and engaged in moving cars over the railroad of his employer, acts for the master in sounding the whistle and in giving signals at road crossings, as well as in moving his engine and train, unless it appears that the act is done from some personal motive of the engineer, and is disconnected from the service of the master; and where he causes a team crossing a public highway in close proximity to his engine to run away, by negligently and unnecessarily blowing the whistle of his engine as a signal while it is standing still, the railway company is liable for the injury resulting from the wrongful act.
2. Where the court has given general instructions to the jury, fairly stating the law applicable to the case, it is not error to refuse instructions asked covering the same ground, though clothed in different language; and *held*, that no error was committed in giving and refusing instructions in this case.

(Syllabus by the Court.)

ERROR from District Court, Smith County. From a judgment for plaintiff defendant brings error.

M. A. Low and W. F. EVANS, for plaintiff in error.

H. H. REED, J. T. REED and D. M. RELIHAN, for defendant in error.

The petition filed in the trial court by Parks, as plaintiff, alleges, in substance, that in April, 1894, he was driving a team of horses hitched to a buggy on the highway near the town of Bel-la-ire; that he approached the track of the defendant railway company from the south, on a road running at right angles to the railroad track; that there was then standing, and moving over the railway crossing, a train of cars attached to a locomotive; that he stopped at a point about 150 feet south of the crossing, and remained there for about five minutes; that the locomotive was then detached from the train, and moved east, across the public highway to a point about thirty feet east of it; that, while the engine was standing still, the plaintiff drove across the track; that when he had reached a point about forty feet north of the track, and while the engine was standing still, and while he was in full view of the engineer and fireman, the engineer then in the employ of the railway company, and there in charge and control of the engine, "then and there needlessly, carelessly, and with gross neglect, and with a mischievous and malicious intent to frighten the team of horses of said plaintiff, did cause the steam whistle of said engine to be suddenly and violently blown, with useless, unusual, and terrifying noise and screeches," knowing at the time that the noise would be liable to frighten his team and cause it to run away; that, by reason of said misconduct of the engineer and of his gross carelessness, he and the servants of the railway company caused plaintiff's horses to become greatly frightened and unmanageable, and to run away, and throw the plaintiff out of his buggy, causing him serious and permanent injuries. To this petition the railway company filed the usual answer in such cases, a general denial, and alleging contributory negligence on the part of the plaintiff. A reply was filed, containing a general denial.

After the jury had been impaneled and sworn, and a witness produced by the plaintiff, the defendant objected to the introduction of any testimony, on the ground that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled, and the first error assigned is on this ruling of the court. The question is raised both on the averments of the petition and on the instructions whether the misconduct charged and proven is the personal misconduct of the engineer, for which he alone is liable, or

is to be attributed to the railway company as his master. It is said that the master can only be made to respond for the misconduct of a servant where that misconduct is connected with the transaction of the business of the master, or in furtherance of his interests or purposes; that when the act is done to gratify the private malice or wanton mischievousness of the servant himself, even though an instrument belonging to the master be used, the latter is not liable for the wrong done. We shall assume that the rule contended for by counsel for the railway company is the law; yet does it avail the plaintiff in error in this case? The petition was not attacked by demurrer, but only by objection to the introduction of testimony. It is therefore to be liberally construed. It charges that the engineer was employed by the defendant, operating its engine; that he negligently and carelessly, with a mischievous and malicious intent to frighten the plaintiff's team, caused the whistle to be suddenly blown. Does this show that the engineer, in blowing the whistle, performed an act disconnected from the service of the master? He was in charge of his employer's engine on its road, at his post of duty. Sounding the whistle for the purpose of giving signals and warnings was a part of his duty. It was his duty to give such signals to warn people of approaching danger, and to refrain from so sounding it when its only purpose would be to induce danger. The use and control of the whistle was as much within the line of his duty as the use of the levers and valves of the engine. We are unable to make a distinction under such circumstances which will disconnect the engineer from the service of the master in the performance of this single act of sounding the whistle. While the averments of the petition possibly might have been made somewhat stronger for the purpose of charging the railway company, they appear as definite as is usual where a master is charged with liability for the misconduct of a servant.

A further criticism of the petition is made on the ground that it fails to show that the horses ran away as a result of the blowing of the whistle. We find the petition sufficient in this respect. Any one reading it would readily understand that blowing the whistle frightened the horses, and caused them to run away. But, assuming that the petition is susceptible of the construction that the engineer acted maliciously in blowing the whistle, the testimony wholly fails to sustain any such charge. Taken in its strongest light, it merely shows that the whistle was sounded unnecessarily, and without regard for the plaintiff's safety. The evidence of the engineer and fireman tends to show that the engine had started to back across the highway before the plaintiff drove onto the crossing;

that the engineer, in order to avoid injury to the plaintiff, stopped his engine, and sounded the whistle. All the evidence shows that, after the plaintiff was thrown from his buggy, the engineer and fireman went to his assistance. No act or expression is called to our attention indicating any malicious or mischievous purposes in the mind of the engineer. The case therefore stood before the jury on proof tending to show negligence and carelessness on the part of the engineer in the discharge of his duties.

The points decided are stated in the syllabus.

Opinion by ALLEN, J.

OLDS v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, October, 1898.

PASSENGER ON MIXED TRAIN INJURED. — A passenger who rides on a mixed train of freight and passenger cars, the only regular train run on a branch road, with the business of which he is well acquainted, must be presumed to have assumed the additional dangers incident thereto.

REPORT from Superior Court.

PARKER F. MARTIN, for plaintiff.

DANA MALONE, for defendant.

KNOWLTON, J. — This is an action to recover damages for an injury received by the plaintiff while riding in a car of the defendant corporation. The case was tried without a jury. The judge found that the jerking and jolting were "greater and more severe than would occur on an ordinary passenger train running under due care, and ruled that if the liability in respect to preventing injury by jolting and jerking and stopping suddenly is the same, and if the obligations are the same in all these respects, on a freight or mixed train, such as this train was, as on an ordinary passenger train, the plaintiff is entitled to recover; * * * but, if the defendant was not liable for such jolting and jerking as was ordinarily incident to a train of this kind, the plaintiff was not entitled to recover." By agreement of the parties, the case was reported to this court. If the ruling was correct, judgment is to be entered for the defendant; if incorrect, for the plaintiff. It must be assumed that on the findings of fact this is the only disputed proposition of law which was considered at the trial.

The accident occurred on a branch line of the defendant's rail-

road, about ten miles in length, extending from South Deerfield to Turner's Falls, in the town of Montague. The trains running on this branch of the railroad are usually made up of freight cars and a car known as a "combination car," one part of which is fitted with seats for the conveyance of passengers, and another part is adapted to carrying baggage. It is reasonably to be inferred that there is not sufficient business over this part of the railroad to warrant the running of trains for carrying passengers only. If under these circumstances the defendant was legally bound to provide for the plaintiff, at the place of the accident, a train made up of passenger cars only, or to conduct its business in such a way as to start and stop its trains with no more jerking or jolting than is common in running ordinary passenger trains, the defendant is liable; otherwise it is not. The nature of the defendant's business on this line, and the mode of conducting it, were well known to the plaintiff, and he must be assumed to have made his contract for carriage in reference to existing conditions. It is obvious that common carriers must adapt their vehicles and methods to the business to be done. There is every kind of business to be provided for in different places, from the carrying of thousands of tons of freight and tens of thousands of passengers per day over a single line, to the maintenance of lines over which only an occasional passenger will pass and a few small articles of merchandise be carried. In some places long passenger trains, with the best possible equipment for safety and comfort, are reasonably required; in others a single horse and a cheap wagon are all that can be maintained from the income of the business for which provision is to be made, and all that reasonably can be expected. It is the duty of a carrier of passengers to exercise "the utmost care consistent with the nature of his undertaking, and with due regard for all the other matters which ought to be considered in conducting the business." *Dodge v. Steamship Co.*, 148 Mass. 207-218, 19 N. E. Rep. 373. If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains. The law is clearly expressed in *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. Rep. 204, as follows: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences and all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the conditions provided by the company, subject to all of the ordinary inconveniences and delays and hazards incident to such trains, when made up and equipped in the ordinary manner of

making and equipping such trains, and managed with proper care and skill. * * * But, if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibilities for their safe carriage is not otherwise relaxed. From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train, and not to the other; and it is these hazards the passenger assumes in taking a freight train, and not hazards or peril arising from the negligence or want of proper care of those in charge of it." Principles decisive of the present case are stated in *Le Barron v. Ferry Co.*, 11 Allen, 312, and in *Heyward v. Railroad Co.*, 169 Mass. 466, 48 N. E. Rep. 773. See, also, *Dodge v. Steamship Co.*, 148 Mass. 207-218, 19 N. E. Rep. 373; *Railroad Co. v. Axley*, 47 Ill. App. 307; *Dunn v. Railway Co.*, 58 Me. 187-197; *Lusby v. Railway Co.*, 41 Fed. Rep. 181-184; *Railroad Co. v. Dickerson*, 59 Ind. 317.

The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them. We have no occasion to consider the additional fact that the plaintiff was injured on a part of the railroad which was designed exclusively for freight traffic, beyond the terminus of the line intended for passengers also. There are additional reasons for holding that when the plaintiff went beyond the passenger station over a portion of the freight tracks, where he and other passengers were permitted to ride for their convenience as a favor, he assumed all the risks incident to the ordinary management of a freight train in that place.

Judgment on the finding.

MCISAAC v. NORTHAMPTON ELECTRIC LIGHTING COMPANY.

Supreme Judicial Court, Massachusetts, October, 1898.

LINEMAN INJURED BY FALL OF ELECTRIC LIGHT POLE THAT WAS DECAYED BELOW THE SURFACE OF THE GROUND. — A lineman injured by the fall of an electric light pole upon which he was at work and that was decayed beneath the surface of the ground, will be presumed to have assumed the risk of its breaking when the pole was obviously of uncertain age and the lineman failed by inspection to ascertain whether it was strong enough to sustain him before going on it.

EXCEPTIONS from the Superior Court, Hampden County. A judgment was rendered for defendant and plaintiff brings exceptions.

CARROLL, MCCLINTOCK & STAPLETON, JR., for plaintiff.

WM. G. BASSETT, for defendant.

KNOWLTON, J. — The plaintiff was employed by the defendant as a lineman, and was injured by the breaking and falling of a pole on which the defendant's wires were suspended. The pole was about forty feet in length, was set in the ground about five feet, and was about thirty-five feet high. The undisputed evidence tended to show that it was badly decayed a few inches below the surface of the ground, so that it broke off square with the strain upon it resulting from the plaintiff's weight and the force from wires drawing upon it after other wires had been removed, which probably had previously tended to counteract the strain from those that remained. The plaintiff contends that the defendant was guilty of negligence in failing to ascertain whether the pole was sound and strong, or to take other precautions for his safety.

The plaintiff was directed to go and take down from the pole the two wires upon it which belonged to the defendant, and to put them on a new pole near by, which had been erected on account of a change of grade in a railroad at a crossing. He went alone to do the work, using a horse and wagon belonging to the defendant to carry such tools and materials as he thought he needed. He was a man of experience in this kind of business, and the method of doing the work he seems to have determined for himself. The pole was of chestnut wood, about eight inches in diameter at the top, and about fourteen inches at the surface of the ground. It had been set between eight and nine years, and the evidence tended to prove that it showed no weakness or sign of decay above the ground.

A fundamental question is whether the defendant owed to a line-

man whose business it was to work upon poles all along the line, as occasion might require, the duty to inspect its poles below the ground, and inform the lineman whenever any of them was so decayed as to be unsafe to work upon. The plaintiff admitted in his testimony that he knew that the life of a pole was limited, and that any pole after a time would become unsafe. He had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it. All the evidence tends to show that, in the ordinary course of the business, the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves, so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the poles as to soundness, without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon. The plaintiff testified that there were pike poles belonging to the defendant at the shed from which he started with the horse and wagon, and that he was familiar with the use of pike poles in setting new poles and bracing up old ones, and there is nothing to show that he might not have taken some of them to use in the work if he had chosen to.

The burden was upon him to show that the defendant's neglect

of some duty caused the accident. We are of opinion that there is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business, which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was, therefore, no evidence of negligence on the part of the defendant.

There was no error in the rulings in regard to the admission of testimony. Evidence that the defendant had made no inspection of its pole prior to the accident was immaterial, inasmuch as the defendant owed the plaintiff no duty to inspect it.

The words "It is not the lineman's business to do it," in Dorsey's answer, were rightly stricken out. To say nothing of other objections, they were not responsive to the question. The question whether it was a "part of the work of a lineman to make that inspection" was properly ruled out. It called for an opinion of the witness in regard to the legal effect of a contract. The question whether linemen customarily performed that work of inspection was also immaterial. So far as appeared it was not the custom of anybody to make such an inspection; but, in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it.

Our view of the main question makes it unnecessary to consider whether the general duty of the defendant to the plaintiff in regard to the strength of poles on which he was working is affected by the fact that it was not the owner of the pole that broke, but was merely using it in its business, under the authority of the owner.

Exceptions overruled.

CLARK v. VILLAGE OF DAVISON.

Supreme Court, Michigan, November, 1898.

MUNICIPAL CORPORATIONS — FILING CLAIM FOR INJURIES —

WAIVER. — Where the plaintiff and the defendant village pursuant to a resolution of the village council entered into an agreement to arbitrate a claim for personal injuries, and afterwards the plaintiff refused to arbitrate and brought suit, such action on the part of the village council was not a waiver of the required filing of a verified claim under Village Act 1895, c. 5, § 7, which provides that it shall be a sufficient defense to an action for the

collection of a claim against a village for personal injuries that it has never been presented or certified to the council for allowance.

PLEADING. — The defense that no such claim was filed before commencing suit may be raised under the plea of the general issue.

ERROR to Circuit Court, Genesee County. From a judgment for defendant, plaintiff brings error.

BLACK & BROWN (HEIMS & MARTIN, of counsel), for appellant.

ED. S. LEE (JAMES S. PARKER, of counsel), for appellee.

LONG, J. — This action was brought to recover for injuries received on a defective sidewalk. Defendant pleaded the general issue to the declaration filed in the cause. The injury occurred on October 20, 1897, and the suit was commenced on December 6th thereafter. After the plaintiff was sworn in his own behalf on the trial, counsel for defendant objected to any evidence being given in the case, for the reason that the declaration did not set out that the claim made by plaintiff was ever presented to the village council prior to bringing suit. The record is silent as to what disposition the court made of this motion; but the plaintiff was permitted to proceed with his proofs, from which it appeared: That on October 20, 1897, while he was passing along the walk on Second street, in the village, he stepped his right foot on the end of a plank in the walk, when the other end raised up, catching his left foot, and throwing him to the ground, severely injuring his left knee. That, the next morning after the injury, he sent for two members of the council, who were members of the sidewalk committee. That they came to see him, and examined his knee. That, on November 10th following, a resolution was unanimously carried by the common council of the village, as follows: "Moved by Trustee Hand, that the president and clerk consult with Mr. William H. Clark, in regard to injuries claimed by him to have been received in a fall upon a defective sidewalk in the village of Davison, and obtain the consent to settle said claim, provided such claim is proven; such settlement to be made with the village of Davison by a board of arbitration, and entering into bonds for said settlement." That the president and clerk of the village called on plaintiff thereafter, and an agreement to arbitrate was entered into, and signed by the parties. That a bond was also drawn up to be signed and the arbitrators were agreed upon. That the plaintiff failed to procure a surety on the bond. That the time was set for the arbitrators to meet, but that they failed to meet at the time fixed. That an agreement was then made to arbitrate without plaintiff's giving a bond. That thereafter plaintiff refused to arbitrate, and notified the members of the council that he should take the matter into court. It

also appeared that the plaintiff failed to file any verified statement of his demand with the council, as required by Act No. 3, Pub. Acts, 1895. Thereupon the court directed the verdict in favor of defendant. Plaintiff now contends: 1. That the action of the council in passing the resolution to settle the matter by arbitration and the agreement entered into to arbitrate amounted to a waiver of the right to have a verified statement of the demand from the plaintiff, or, at least, that it was a question for the determination of the jury whether the action taken amounted to a waiver of that right; 2, that the defendant, having pleaded the general issue, without setting forth any notice that it would insist on the trial that the notice was necessary, waived this defense.

Section 7 of chapter 5 of the Village Act of 1895, above referred to, provides: "It shall be a sufficient defense in any court to any action or proceeding for the collection of any demand or claim against the village for personal injuries, or otherwise, that it has never been presented, certified to or verified as aforesaid to the council for allowance." The preceding portion of the same section provides: "The council shall audit and allow all accounts chargeable against the village; but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that the services therein charged have been actually performed or the property delivered for the village, that the same charged therefor are reasonable and just, and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are endorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each." It will be noticed that this section of the statute is almost identical with section 20, c. 8, Act No. 215, Pub. Acts, 1895, which is cited and construed in *Griswold v. City of Ludington*, (Mich.) 74 N. W. Rep. 663. In that case it was held that "it was the evident intent of the legislature, by these sections of the charter, to compel all parties having claims against a city to make a statement of the claim under oath, or to obtain the certificate of an officer of the corporation certifying to the correctness of the claim; and, until this is done, no action can be commenced or maintained." The provisions of a similar charter were passed upon in the case of *Springer v. City of Detroit*, 102 Mich. 300, 60 N. W. Rep. 688. In that case the declaration did not contain any allegation that the claim had been presented to the common council, and the proof disclosed the fact that none had

ever been so presented. The plaintiff having recovered below, the judgment was reversed in this court, and a new trial awarded.

But counsel contends, as we have stated, that these provisions of the statute have been waived by the village authorities. It is claimed that the case falls within *Canfield v. City of Jackson*, (Mich.) 70 N. W. Rep. 444; that as good cause exists here for holding that the provisions of the statute have been waived as in that case. But in the *Canfield Case* no claim was made under the statute by the defendant until after verdict and judgment, and then only on motion for new trial, which this court held to be too late. That case was not like the present; nor is it like the case of *Germaine v. City of Muskegon*, 105 Mich. 213, 63 N. W. Rep. 78, where the claim was not rejected for the reason it was not properly verified; nor *Griswold v. City of Ludington*, *supra*. Here the parties proposed to submit to arbitration. The village stood ready to try the case in that way, even without the plaintiff's giving the bond which was first agreed to be given by him. Arbitrators were agreed upon, when the plaintiff refused to go on, and soon thereafter commenced this suit. It is difficult to understand how, under these facts, it can be claimed that the village council waived the provisions of this act. If the arbitration had taken place without the village authorities insisting upon the verified claim being filed, the case would have undoubtedly fallen within the rule of *Canfield v. City of Jackson*, *supra*; but the plaintiff himself put a stop to these proceedings, and commenced his suit within forty-seven days after the injuries were received, without filing sworn statement. Under these circumstances the court very properly held that there was no evidence to be submitted to the jury on the question of waiver.

The second point made — that is, that the plea contained no notice of statutory defense — has no force whatever. This fact can be shown under the plea of the general issue. This requirement of the statute is for the benefit of the village, and is a matter which may be used by it by way of defense. *Wright v. Village of Portland*, (Mich.) 76 N. W. Rep. 141.

The judgment below must be affirmed. The other justices concurred.

JACKSON V. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, October, 1898.

BOY SITTING ON STEP OF MOVING STREET CAR FALLING OFF AND

INJURED. — 1. A boy eight years and four months old got upon the rear platform of a street car, intending to ride thereon to his home, several blocks distant. While sitting upon this platform with his feet upon the car step, where there was no gate, the car started, and while it was running fast the boy became dizzy, fell off, and was injured. The motorman (who was also conductor) knew that the boy was on the car. *Held*, that merely getting upon the car and sitting down on the platform with his feet on the step was not *prima facie* evidence that the boy was a trespasser, and whether he was a passenger or trespasser it was not error for the trial court to submit to the jury the question whether it was negligence on the part of the acting conductor to permit him to ride, sitting in that position, while the car was running fast.

2. It was within the province of the acting conductor to compel this boy to go inside the car, or stop it, and put him off; and, if he did not do so, the jury had a right to say that the conductor was guilty of negligence which was imputable to the company.

3. *Held*, also, that the rear platform of a street car running fast was a place of danger for this boy, riding thereon, and just what degree of intelligence and prudence could be expected of him was properly left to the jury to determine, as well as whether, upon all of the facts, he was thereby guilty of contributory negligence.

4. *Held*, further, that the damages awarded were not excessive.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Ramsey County, entered on verdict in favor of plaintiff.

MUNN & THYGESON, for appellant.

JOHN H. IVES, for respondent.

BUCK, J. — William Jackson, by his guardian, brought this action against the St. Paul City Railway Company to recover damages for injuries received by him on the 7th day of September, 1894, while riding on one of its cars on Randolph street, in the city of St. Paul. The car was in charge of the motorman, who also acted as conductor. This car was of the ordinary kind, except that it did not have gates, now used on street cars in said city. It had railings at the rear end of the car, and only one step to the ground. The boy, William Jackson, and his brother Louis Jackson, some two years older, had been sent to the meat market, and had started to return home, when, seeing the car about to start they got upon it, and sat

down on the rear platform, with their feet upon the step of the car. The evidence tended to show that while the boys were sitting there the motorman got upon the car, and in so doing passed between them, each boy moving a little to let him pass. A passenger was sitting inside the car, and near the rear end of the same, and when the motorman came to collect his fare he saw these boys still sitting in the same position on the car. There was only one passenger on the car. While the car was going very fast, the injured boy from some cause became very dizzy, and was thrown off or fell off the car, rolled over and over in the dust, and was seriously injured. The evidence tended to show that Louis Jackson had requested this passenger — Winter by name — to ask the motorman to stop the car, because they wanted to get off before reaching Victoria street, and it was after this request that the boy fell off. Winter refused to ask the motorman to stop the car. There was plenty of room inside the car, and, had the motorman so desired, he could have permitted the boys to have ridden inside, or ordered them off the platform to a place of safety. This injured boy had previously seen small boys frequently riding on the car in the same manner as he did, although his father had forbidden him to do so, and threatened him with punishment in such case.

We cannot say, as a matter of law, that this boy was a trespasser. He testified that he was not stealing a ride, and intended to have paid for it, and that he would have got off the car if he had been asked to do so. Whether this testimony was true or not was a question for the jury. It was not contradicted. Merely getting upon a car and sitting down, inside or out, is not of itself *prima facie* evidence that in so doing a person is a trespasser. But, whether this boy was a passenger or trespasser, it was certainly proper for the trial court to submit to the jury the question whether it was negligence on the part of the motorman, acting as conductor, to permit a child eight years and four months old to ride sitting on the rear platform, with his feet upon the step, while the car was running fast. It was within the province of the motorman to compel this child of tender years to go inside the car, or stop it and put him off; and, if he did not do so, the jury had the right to say that he was guilty of negligence, which was imputable to the company. There can be no question but what the child was riding in a place of danger to life and limb, and just what degree of intelligence and prudence could be expected of a child of such age was properly left with the jury to determine, as well as whether, upon all the facts, he was thereby guilty of contributory negligence. The rule laid down in Booth, St. R'y Law, is as follows: "A child not of the

age of discretion to understand the danger of riding upon the platform of a street car cannot be charged with negligence in so doing. While the company would not be liable to a person of mature age and discretion, who voluntarily occupies such a position on the car, yet, in the case of a child lacking such discretion, and to whom negligence cannot be imputed, it would be the duty of the agents or employees of the carrier to warn him of his danger, and, if necessary, not to stop with the warning but to compel him to occupy a proper place in the car, especially if he is not in charge of some person of sufficient age and discretion to care for him. Accordingly, it has been held negligence on the part of a driver to allow a child of the age of five, with another, eleven years old, or a boy nine years of age, to ride on the platform, and gross negligence to allow a child of ten years to ride on the step of the front platform." Assuming, therefore, that this child was in a place of danger, that the motorman knew it, that the child was of tender years, though of sufficient age to exercise some degree of care, and that the measure of it depended upon his capacity and intelligence, yet the motorman controlling the movement of the car was bound to use reasonable care to avert the danger; and whether he did so, under the circumstances, was a question properly left to the jury. *Hepfel v. Railway Co.*, 49 Minn. 263, 51 N. W. Rep. 1049.

The jury allowed the plaintiff \$750 damages, and defendant's counsel contend that this amount is so excessive that the jury must have been influenced, in so doing, by passion and prejudice. A careful analysis of the evidence, we think, leads to the conclusion that the verdict should not, in this respect, be disturbed. The boy was quite seriously injured, and had not fully recovered at the time of the trial, and whether he would ever completely recover from such injury was a matter of considerable uncertainty.

Order affirmed.

MITCHELL, J. — I consider the case a close one, but have concluded, although with some hesitation, to concur in the conclusion that, in view of the tender age of the boy, the evidence made a case for the jury. The trial court may have erred in favor of the defendant in limiting, in his charge, the issue as to the conductor's negligence, to the question whether he ought to have reasonably anticipated that the boy might fall off by reason of becoming dizzy; but this would be no ground for setting aside a verdict in favor of the plaintiff if it was justified by the evidence.

CANTY, J. — I concur with Mr. Justice Mitchell. In these days, when, as a general rule, parents exercise so little control over their children, and the conductor is not allowed to exercise any efficient

control over them at all, and the children have no wholesome fear of anything, and no respect for any constituted authority, it is exceedingly difficult for the conductors of street cars and the drivers of other vehicles to keep children from riding on all sorts of dangerous places upon and beneath the vehicles. It is with much reluctance that I concur.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY v. KELLOGG.

Supreme Court, Nebraska, September, 1898.

EMPLOYEE INJURED BY USE OF APPLIANCE ALLEGED TO BE DEFECTIVE — PLEADING — MISCONDUCT OF COUNSEL. — 1. The essential elements of a petition charging actionable negligence are that the plaintiff, without fault on his part, has sustained an injury as the proximate consequence of a specific negligent act or of the omission of the defendant.

2. An averment in a petition that the defendant negligently permitted a certain appliance to become defective, and negligently suffered it to remain in a defective condition, implies that he knew or was culpably ignorant of the defect.

3. Where a servant sues his master on account of injuries resulting from the use of a defective tool or appliance, the fact that the accident happened cannot be taken as evidence of the master's negligence.

4. To entitle the plaintiff to a verdict in such case, he must affirmatively show that the defendant either knew or was inexcusably ignorant of the defective condition of the implement or appliance causing the injury.

5. In an action to recover for injuries caused by defective appliances, an instruction that it was the "duty of the defendant to exercise reasonable care in keeping such machinery and appliances in a reasonably safe condition for use" does not place the burden of proof on the defendant.

6. A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to the remarks complained of, and then enter an exception if the court rule adversely or refuse to make a ruling.

7. But where the misconduct of counsel is so flagrant, and of such a character, that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded, regardless of the want of an objection and exception.

8. Evidence examined, and damages *held* to be excessive.

(Syllabus by the Court.)

ON rehearing.

SULLIVAN, J. This cause is now before us on rehearing. The original opinion, which contains a sufficient statement of the facts, will be found in 54 Neb.; 74 N. W. Rep. 454. Counsel for defendant

contended on the first submission, and still insist, that the petition does not charge the company with actionable negligence. This contention is grounded on the fact that there is in the petition no averment that the defendant knew, or ought to have known, of the defective appliance which was responsible for the accident. That knowledge, or inexcusable ignorance, on the part of the defendant, is an essential element in the plaintiff's right of action, cannot be doubted. If there was neither actual nor constructive notice, the defendant was blameless, and the plaintiff has no claim on it for indemnity. But it must be remembered that in pleading negligence it is not necessary to set out the evidential facts. An allegation that an injury has resulted from a specific negligent act or omission of duty on the part of the defendant, without fault on the part of the plaintiff, is a sufficient statement of facts to support a judgment. *Railroad Co. v. Wright*, 49 Neb. 456, 68 N. W. Rep. 618; *O'Connor v. Railway Co.*, 83 Iowa, 105, 48 N. W. Rep. 1002; *Railroad Co. v. Utz*, (Ind. Sup.) 32 N. E. Rep. 881.

The averment of the petition that the defendant negligently permitted the brake rod to become defective, and negligently suffered it to remain in a defective condition, carries a necessary implication that the company either knew, or should have known, of the defect.

In the case of *Crane v. Railway Co.*, 87 Mo. 588, it is said that "the allegations in the petition that the injury was caused by the negligence of the master in failing to provide safe appliances, and stating particularly the defect," is equivalent to a specific allegation that the master knew, or might have known, of the defect. It is claimed that the former opinion proceeds on the assumption that proof of the accident was *prima facie* sufficient to entitle the plaintiff to a verdict, and that the burden of disproving the alleged negligence was on the defendant (1). The law on the subject is clearly

1. *The following are some recent decisions relative to averments of negligence in actions for personal injuries:*

An allegation in a complaint that an act was negligently performed is sufficient, without setting out the details of the negligence. *Rogers v. Truesdale*, 57 Minn. 126.

In an action for negligence, where a legal duty is shown and its breach a general allegation that the acts done or omitted were so done or omitted negligently, is sufficient. *Louisville, E. & St. L. Consol. R. Co. v. Hicks*, 11 Ind. App. 588.

Negligence was sufficiently stated in a complaint which alleged that the defendant left the body of his dead cow in a public highway and that while plaintiff was exercising proper care in attempting to drive past the body, his horses were frightened thereat and ran away, and caused the injury to him. *Hindman v. Timme*, 8 Ind. App. 416.

In an action against a street railway company for personal injuries the complaint was not demurrable because the only allegation as to negligence was that defendant's servant "negligently

and accurately stated in the case of *Railroad Co. v. Ryan*, 52 Kan. 637, 35 Pac. Rep. 292, as follows: "It has been frequently ruled by this court, in accordance with the authorities generally, that an employee of a railroad company, by virtue of his employment,

ran said car against the wagon." *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47.

A complaint that avers generally negligence and freedom from contributory negligence is good against a demurrer, unless facts specifically set out show the averments to be untrue. *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433.

In an action for damages for negligence it is sufficient to state that the act was negligently done, without alleging what particular acts constituted the negligence. *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181.

One who claims damages from negligence must aver in his pleading the facts constituting the negligence. *West Chicago St. R. Co. v. Coit*, 50 Ill. App. 640.

In an action against a railroad company for negligence a complaint is sufficient which alleges that plaintiff's mule was frightened at the unnecessary noise of defendant's train near a highway, and "owing to the negligence of the defendant's employees running and managing said cars." *Oxford Lake Line Co. v. Stedman*, 101 Ala. 376.

A complaint alleges with sufficient certainty the negligence of the defendant wherein it is stated that in the car in which the plaintiff was riding, on the wall over the seat given him, defendant railroad company had negligently hung, placed, or affixed, a bottle containing a fluid, and that the bottle was broken or exploded and the contents negligently spilled on plaintiff's clothes and person. *Ala. G. S. R. Co. v. Collier*, 112 Ala. 681.

A complaint that alleges negligence on the part of defendant or O. is in-

sufficient in not alleging facts importing defendant's liability for both its own and O.'s negligence. *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185.

In an action for injuries caused by negligence of defendant it is sufficient that the complaint allege generally negligence on the part of the defendant. *House v. Meyer*, 100 Cal. 592.

The complaint in an action for personal injuries is good against a demurrer though defendant's negligence be alleged in general terms only. *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561.

A general averment of negligence of a street railway in running its car is sufficient to include negligence in sounding the gong on approaching a frightened team. *Benjamin v. Holeyoke St. R'y Co.*, 160 Mass. 3.

A general averment of negligence is sufficient, and it is enough to specify the act that caused the injury, and aver generally that it was negligently and carelessly done. *Senate v. Chicago, M. & St. P. R. Co.*, 57 Mo. App. 223.

A petition for damages for injuries from negligence should advise the defendant of the particular negligence complained of so that he may know against what he is called upon to defend himself, but this may be done in general terms. *Benham v. Taylor*, 66 Mo. App. 308.

A general charge of negligence is good as a basis of proof unless objected to in proper time before trial. *Conrad v. De Montcourt*, 138 Mo. 311.

An allegation in a complaint that the injuries were caused by the "careless and negligent manner" in which defendant's servants managed certain appliances, is sufficient, without alleg-

assumes all the ordinary and usual risks and hazards incident to his employment; that, as between a railroad company and its employees, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad; that, as between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its railroad; that it will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty; that, where an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show, either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice; that proof of a single defective or imperfect operation of any such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such

ing the particular acts of such servants constituting carelessness and negligence. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24.

An allegation of negligence in a pleading is a mere conclusion and the facts from which the inference of negligence arises must be pleaded. *Omaha & R. V. R. Co. v. Wright*, 47 Neb. 886.

An allegation that one of defendant's trains negligently struck cars on a side track was sufficient, without the complaint showing particularly how the train negligently struck them. *Galveston, H. & S. A. R. Co. v. Croskell*, 6 Tex. Civil App. 160.

Allegations that defendant's car on which the injured party rode had a defective brake, and that, when it approached the curve where it was derailed defendant's servant negligently

applied the full power to it, whereby it was derailed and plaintiff was thrown through the window and injured, sufficiently specify the negligence of which complaint is made. *San Ant. St. R. Co. v. Muth*, 7 Tex. Civil App. 443.

A complaint is demurrable which charges negligence whereby a traveler on the highway was killed at a railroad crossing, but fails to state any particular act or omission of defendant constituting negligence. *Wilson v. N. Y., N. H. & H. R. Co.*, 18 R. I. 491.

In an action for personal injuries a complaint is sufficiently definite wherein it is alleged, that while plaintiff was driving along the highway defendant drove up behind at great speed and negligently ran into plaintiff's vehicle. *Hanson v. Anderson*, 90 Wis. 195.

machinery or instrumentalities." In the case of *Railway Co. v. Cox*, 48 Neb. 807, 67 N. W. Rep. 740, it was held that, in an action by a servant against his master for an injury occasioned by a defective tool or appliance, the jury are not authorized to infer negligence from the mere fact that the accident happened. To the same effect are *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; *Railroad Co. v. Fry*, 131 Ind. 319, 28 N. E. Rep. 989; *Hull v. Hall*, 78 Me. 114, 3 Atl. Rep. 38; *Railway Co. v. Gaines*, 46 Ark. 555; *Mixter v. Coal Co.*, 152 Pa. St. 395, 25 Atl. Rep. 587; *Johnson v. Railway Co.*, 36 W. Va. 73, 14 S. E. Rep. 432; *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. Rep. 798; 1 Bailey, Mast. Liab., sec. 101.

The instructions of the trial court were in harmony with the principles laid down in the authorities cited, and the original opinion, rightly understood, does not declare a different doctrine. The negligence pleaded, and the negligence upon which plaintiff's right to a verdict was, under the instructions, made to depend, consisted in the failure of the company to keep the brake-rod in a safe condition for use. The jury were told that it was the "duty of the defendant to exercise reasonable care in keeping such machinery and appliances in a reasonably safe condition for use." The burden of proof was not placed on the defendant. The plaintiff proved the accident, and also introduced affirmative evidence from which the jury might well infer that the defect in question had existed for a considerable length of time. That the company's inspectors did not discover the defect is not conclusive against its existence. The worn edges of the hole in the brake-staff and the flattened condition of the wire were persuasive facts supporting plaintiff's theory. They tended to prove that the defect had existed so long that the failure to discover and properly repair it must have been the result of careless inspection.

Defendant has presented quite an elaborate argument in support of its demand for a reversal of the judgment on account of the misconduct of Mr. Shafer, one of the attorneys for the plaintiff. We have again examined the question, and reach the conclusion that it is the duty of a party who complains of the misconduct of his adversary's counsel to make a seasonable objection, and then secure a ruling of the court upon such objection; and if the ruling is against him, or if the court refuses to rule, he should enter an exception. In 2 Enc. Pl. & Prac. 755, the rule is stated as follows: "In order that a party may avail himself in an appellate court of an objection for misconduct of opposing counsel in the argument of a case, he must not only interpose a seasonable objection, as has just been stated,

but he must then press the court to a distinct ruling, and, if dissatisfied therewith, enter an exception; otherwise there is nothing presented for review." In this case there was no formal objection, and consequently no ruling, or contumacious refusal to rule, which we are authorized to review. Had the court, in response to a proper objection, vigorously condemned the remarks of counsel we think they would have left no prejudicial impression on the minds of the jury. By prompt action, the defendant's counsel might have obtained an effective antidote for the poison in Shafer's speech; but he failed to act, and is, therefore, not in an attitude to have his complaint now considered. We would not, however, be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant, if the offensive remark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence, a new trial should be promptly awarded, regardless of the want of objection and exception. *Iron Co. v. Field*, (Ala.) 16 Southern Rep. 538; *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. Rep. 838; *Paper Co. v. Banks*, 15 Neb. 20; *Live-Stock Co. v. May*, 51 Neb. 474; *Tucker v. Henniker*, 41 N. H. 317; *Martin v. State*, 63 Miss. 505; *Rudolph v. Landwerlen*, 92 Ind. 34.

In view of the condition of the record we are not warranted in reversing the judgment on account of misconduct of counsel; but we have concluded, after a thorough consideration of the evidence, that the damages are excessive, and must have been assessed while the jury were yet under the sway of counsel's superheated eloquence. The judgment will be reversed, unless plaintiff shall within thirty days file with the clerk of this court a remittitur for the sum of \$2,500. If such remittitur be so filed the judgment for \$6,500 will stand affirmed.

Judgment accordingly.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY v. VOSS.

Supreme Court, New Jersey, September, 1898.

RAILROAD EMPLOYEE THROWN FROM COAL CAR BY IMPACT OF
OTHER CAR—FAILURE OF COMPANY TO MAKE RULES FOR
EMPLOYEES. — 1. A railroad company, in the operation of its railroad

and freight and coal yards, is not bound to make, establish, and enforce rules and regulations to protect its servants and employees from the risk of danger incident to the employment, or from those risks which are obvious, or risk of danger arising from the negligence of co-servants in the same common employment, nor from the risk of danger to be incurred by reason of the want of ordinary care on the part of the servant in his employment.

2. The general averment in a count in a declaration of the negligence of the railroad company to make and enforce reasonable and proper rules and regulations for the guidance of its employees in its business, or in the operation of its railroad yards, is not a sufficient averment of an element of negligence upon which an action for personal injuries by the servant against the company can be based.

(Syllabus by the Court.)

DEMURRER to declaration.

JOSEPH A. MCCREERY, for plaintiff.

J. FLAVEL MCGEE, for defendant.

LIPPINCOTT, J. — In this case separate demurrers are filed to the first and third counts of the declaration. The action is one by the plaintiff to recover damages of the defendant for personal injuries inflicted while the plaintiff was in the employment of the defendant in its freight coal yard at the terminus of its railroad at the Hudson river, in Jersey City. The first count of the declaration avers that at the terminus of this railroad the railroad company had a coal yard appurtenant to the railroad, and used in connection with the distribution of coal carried by the railroad company to the various points of unloading, by means of tracks laid in the said yard, over which the cars carrying coal were transferred. It avers that in January, 1896, the plaintiff was a servant of the defendant in this yard, and that it was a part of his work or duty to go upon the coal cars standing in said yard, and get coal to be used in the said business of operating its railroad. One averment of negligence in this count is that the defendant suffered and permitted in the operation of its yard, "its cars to be kicked with great force and violence across this yard; that is to say, to be driven across by giving them an impetus and detaching them." So far as this averment, standing alone, is concerned, the impetus and the detachment of the cars was the manner in which the work of the yard was done by the co-employees or co-servants of the plaintiff in the employment of the defendant, whose negligence in this respect, even if it be conceded to exist, would not form a basis for an action for injuries arising by reason of such negligence. The negligence of a co-servant is a risk assumed in the common employment. But the count of the declaration obtains its force from the further averment of negligence of the defendant in operating its roads, which is couched

in these words, to wit, "and of its negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employees in the operation of its said yard," and again charging it with "negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employees in its said business." The declaration further avers that cars were permitted or suffered to be drawn with great violence across the yard, and against the car from which the plaintiff was obtaining coal, thereby causing him to be thrown from the car, and sustaining injury. There is no averment whatever setting forth in what respect the failure to make reasonable rules and proper regulations was the cause of the injury to the plaintiff. Even if such averment had been contained in this count of the declaration, still it is clear that in the work of the operation of this yard, and the business carried on therein, the plaintiff assumed all the risks of the negligence of his co-servants, as incidental to this class of employment, and therefore the gravamen of the count, in so far as the liability of the defendant is concerned, is in the averment that the company failed to establish certain general rules for the guidance of its employees or servants in their relations to each other in the work being carried on in this yard. This count of the declaration is framed upon the general idea that it was the duty of the defendant, as master, to make and enforce rules and regulations for the operation of its yard. I think it is sufficient to say that in the law no such legal duty existed upon the part of the defendant. Risks which are incidental to the employment, risks which are obvious, and those arising from the negligence of co-servants, and those created by the want of reasonable care in the exercise by the servant of his employment, are all assumed by the servant when he enters or continues in the service; and there cannot, in reason, be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks. The general averment of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition, and it cannot be founded upon any sound reasoning. The cases to which reference has been made in support of this count are cases in which is declared the duty of the master to exercise the legal degree of care to provide a safe place for the servant to do his work, or provide safe appliances with which to perform it, and that the master is answerable for default in these respects, and that the default may exist in the system provided for the servant to work by, or in the particular method by

which the work is done, and can have no application whatever to the case in hand. There is a class of cases which hold that, if rules and regulations are made, they must be of such a character as will afford reasonable protection from incidental or obvious dangers, and if they are unreasonable, and obedience to them causes injury to the servant, a liability arises upon the part of the master; but there is no principle of law compelling the establishment of rules by which the work of the master shall be done by the servant. The great danger to the master would be the establishment of rules and regulations for the conduct of his business, the operation of which might result in risks not contemplated by the parties, and involve serious discussion as to their reasonableness. The master is not bound to make any such rules, but is entitled to have his liability to his servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relation of master and servant to each particular cause or case of injury as it arises, and to the system or manner in which his business is operated or conducted. Neither do the cases in which the question of the duty of the master towards an ignorant or inexperienced workman entering upon a dangerous employment is discussed have any place in the determination of the questions presented by this count. The demurrer to the first count of the declaration is sustained with costs. The third count of the declaration appears to present a good cause of action. It is averred in this count, in apt and appropriate language, that the defendant failed to exercise reasonable care in selecting co-servants with the plaintiff, and knowingly employed incompetent, careless, and inefficient co-servants, and that, as such, they negligently and carelessly performed their duty in this employment, whereby the injuries arose to the plaintiff. The averments in this count clearly and sufficiently set forth this element of negligence, and the results thereof to the plaintiff. The demurrer to the third count therefore will be overruled, with costs.

RUNYAN v. CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Court of Errors and Appeals, New Jersey, October, 1898.

PASSENGER EXCLUDED FROM TRAIN BECAUSE HE WAS CARRYING PARCELS. — 1. Upon a ticket delivered by a common carrier of passengers to one of its passengers, upon the payment of his fare, was printed: "Good for one continuous passage in either direction between New York

and Elizabeth, N. J." "No stop-off allowed." "Free transportation allowed for 150 lbs baggage (wearing apparel) only, and company's liability expressly limited to \$1 per lb." *Held*, that the reference to baggage was notice of the limit of accommodation and responsibility, upon the part of the carrier, the passenger might have with respect to baggage committed to the custody of the carrier, and did not restrict or in any way affect the common-law right of the passenger to carry personal baggage with him.

2. The common-law right of such a passenger is to take with him his personal baggage appropriate to the journey and its object; that is, not only wearing apparel for use and ornament, but other articles, all within reasonable limit, the use of which is personal to him during his journey and in accomplishing its purposes.

3. If a common carrier of passengers for a long time acquiesces in and makes accommodation for the carriage of small packages of merchandise of its passengers in its passenger cars as personal baggage, so as to lead the passengers to accept and rely upon its attitude in that respect as one of its regulations, it can resume its rights under the law only after reasonable notice of its rescission of the regulation so made.

4. A passenger refused admission to such a carrier's cars, because he proposes to take with him a small package of merchandise, may put in evidence the regulation aforesaid as a step in his proofs, upon suit brought on account of such refusal of admission.

DEPUE, GUMMERE, HENDRICKSON and NIXON, JJ., dissenting.

(Syllabus by the Court.)

. ERROR to Circuit Court, Union County. From a judgment of nonsuit, plaintiff brings error.

The plaintiff in error was the plaintiff below. He was nonsuited in the Circuit Court, and now assigns error in that nonsuit, and in the overruling of two questions at the trial, to which reference will presently be made. The facts in proof are as follows: Elmer Runyan, a resident of the city of Elizabeth, and the president and treasurer of a nursery company there, on the 30th of December, 1896, went to New York city on the railway of the defendant, a common carrier of passengers. He paid the fare demanded by the defendant's ticket agent for an excursion trip to New York and return, and received from that agent a ticket in two parts. The part concerned in this inquiry was denominated the "return coupon," and contained these announcements: "Good for one continuous passage in either direction between New York and Elizabeth, N. J." "No stop-off allowed." "Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to \$1 per lb." When he started on his journey it was wet, and he wore a pair of rubber shoes. It does not appear whether or not he took any baggage with him from Elizabeth. In New York he purchased ten pounds of nails. The purpose of this purchase does not appear. Between five and six o'clock in the

evening he had with him a satchel containing a pair of gloves and some catalogues and papers pertaining to his business, which had been in use by him, and also two small packages, one of which contained the nails he had purchased, and the other a letter file and the rubber shoes he had worn from Elizabeth in the morning. At the ferryhouse he exhibited to the gate keeper his "return coupon." It does not appear that the gate keeper saw the satchels and bundles. The coupon was punched by the gate keeper, and he was permitted to pass upon the ferry boat, and cross the river on it without interference to the defendant's train shed, where, as he was about to pass through a gate to the cars for Elizabeth, the defendant's agents refused to permit him to enter with his satchel and packages. Retaining the bundles, after some delay, he walked along the defendant's tracks a mile or more, to another station of defendant called Communipaw, followed by the defendant's agents, and there paid the proper fare to the defendant's ticket agent for his transportation from Communipaw to Newark, and received a ticket containing these notices: "Good for one passage from Communipaw, N. J. to Newark, N. J., on a continuous train. Only 150 lbs. baggage (wearing apparel) allowed each passenger. Company's responsibility for baggage limited to \$1 per lb., unless special agreement be made." Shortly thereafter he attempted to enter a proper train from Communipaw to Newark, and, because he still retained his satchel and packages, was refused admission, and forced, by the defendant's agents from the steps of the car. He then paid another fare to the defendant's ticket agent for his transportation from Communipaw to Elizabeth, and received a ticket containing these announcements: "Good for one continuous passage in either direction between Communipaw, N. J., and Elizabeth, N. J." "No stop-off allowed." "Only 150 lbs. baggage (wearing apparel) allowed each passenger. Company's responsibility for baggage limited to \$1 per lb., unless special agreement be made." Thereupon he offered his satchel to the defendant's baggage master at Communipaw, and asked that it be checked as baggage to Elizabeth. He was asked to tell what it contained, but refused to do so. The satchel, however, was duly checked, and taken in charge by the defendant, and ultimately carried by it to Elizabeth. The plaintiff retained the two packages, and attempted to enter a proper train of cars for Elizabeth, but was prevented by the defendant's agents from so doing because he had the packages with him. The plaintiff declares, in several counts, upon the contracts for transportation evidenced by the three tickets above mentioned, and alleges, as the breaches of the contracts, refusal to transport him

with baggage. His insistence is that it was his right, under the circumstances of the case, to be transported, together with the satchel and packages he had, which he kept in his possession and proposed to retain during his journey. During his examination at the trial, he was asked by his counsel these questions, which were objected to by the defendant's counsel, and overruled by the trial court. "Q. Had you been accustomed to travel between Elizabeth and New York?" "Q. Do you know whether or not the cars — passenger cars — on the Central Railroad, running between New York and Elizabeth, have any provision for small packages in connection with the seats?"

ROBERT H. McCARTER, for plaintiff in error.

WILLIAM H. CORBIN, for defendant in error.

McGILL, C. (after stating the facts). — It does not appear that either of the three tickets held by the plaintiff purported to be an agreement between him and the company. Each was simply a receipt or token that the holder was entitled to transportation between given stations according to the contract the law made between him and the carrier upon his paying the lawful fare, which contained notices of regulations of the carrier to the effect that the passage should be continuous, and that the holder might have transported, without additional charge, 150 pounds of wearing apparel, under limited responsibility upon the part of the defendant. We do not understand that this last-stated regulation is designed to restrict or in any way affect the common-law right of the passenger to carry personal baggage with him. We deem it to simply state the extent of accommodation the passenger may have with respect to baggage committed to the custody of the defendant. The notice is not couched in the language of an agreement that it shall be a substitute for the passenger's common-law right, and nothing in the case discloses that the plaintiff saw it and accepted it as such substitute. We, then, deem the plaintiff to have been a traveler with the rights which the law accords. He was entitled to take with him, for use, his personal baggage appropriate to the journey, and its object; that is, not only wearing apparel for use and ornament, but also other articles, all within reasonable limit, the use of which was personal to him during his journey and in accomplishing its purposes. To illustrate the character of such articles other than wearing apparel, it is settled that a sportsman journeying for sport may take his gun case or fishing apparatus (*Hawkins v. Hoffman*, 6 Hill, 586); an artist may take his easel when he is on a sketching tour (*Merrill v. Grinnell*, 30 N. Y. 619); a surgeon traveling with troops may take his surgical instruments (*Railroad Co. v. Swift*, 12 Wall. 262); and a

student in pursuit of study may take his needed books and manuscripts (*Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6,692). But the plaintiff could not take with him as personal baggage mere merchandise, the use of which was not personal to him in accomplishing the purpose of the journey (*Collins v. Railroad Co.*, 10 Cush. 506; *Hawkins v. Hoffman*, 6 Hill, 586; *Stimson v. Railroad Co.*, 98 Mass. 83; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. Rep. 711; *Fraloff v. Railroad Co.*, 100 U. S. 24; *Railway Co. v. Keys*, 9 H. L. Cas. 573 (1); nor articles intended for use at his permanent abode, disconnected with his personal use during the journey, or in accomplishing its purposes (*Macrow v. Railway Co.*, L. R. 6 Q. B. 612 (2)). In the case considered, it is deemed that the plaintiff's rubbers and gloves, and, as well, the catalogues and memoranda carried for the business purposes of the journey (*Straub v. Kendrick*, 121 Ind. 226, 23 N. E. Rep. 79), were personal baggage, but that, inasmuch as neither the nails nor the letter file appear to have had any connection with the personal use of the plaintiff upon the journey or in the accomplishment of its purpose, or to be appropriate therefor, we deem that they cannot be regarded as personal baggage. The nails were purchased immediately prior to the plaintiff's return to Elizabeth, under circumstances which make it quite plain that they could have been carried only for uses not personal to the plaintiff either during his journey or in furtherance of its purposes.

But it is insisted for the plaintiff that at the trial he offered to show that the defendant had, by long-continued acquiescence in, and provision in its passenger cars for, the carriage of small packages of merchandise by its passengers, established, as one of its regulations, that such parcels might be carried as personal baggage — to the end

1. In *Belfast and Ballymena R'y Co. v. Keys*, 9 H. L. Cas. 556, it appeared that a passenger, with knowledge that the railway company, though allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise carried to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such. *Held*, that no contract whatever touching the same arose between him and the company, and therefore on its being lost, he was not entitled to recover the value of it from the company.

2. In *Macrow v. Great Western R'y Co.*, L. R. 6 Q. B. 612, it appeared that

a passenger by railway from Liverpool to London took with him in a trunk, as his personal luggage, six pairs sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the company. *Held*, that the articles, being intended for the use of his household when permanently settled, could not be considered as personal or ordinary passengers' luggage.

that he might urge that such regulation gave him a right to carry the parcels in question until, at least, he should have timely notice of the discontinuance of the regulation — and that such offer was overruled erroneously. This offer, it is claimed, is embodied in the two questions overruled. It is deemed that the questions, though introductory, do with sufficient clearness embody the offer. The trial judge does not appear to have had doubt as to their purpose; otherwise he would have called upon counsel to state it. And we think, also, if the defendant company had, previous to the denial of admission of the plaintiff to their cars complained of, for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, that it could resume its right under the law only after reasonable notice of its rescission of the regulation so made. It could not suddenly enforce the right resumed, against passengers who were, in good faith, traveling in reliance upon the previous regulation, without reasonable notice, and ignorant of, and unprepared for, any change in it. . We think that the questions asked were admissible as a step in the plaintiff's proofs, and were wrongly overruled, and for that reason that the judgment should be reversed.

DEPUE, GUMMERE, HENDRICKSON, and NIXON, JJ., dissenting.

REGAN V. PALO.

Supreme Court, New Jersey, October, 1898.

EMPLOYEE INJURED BY SIDE OF TRENCH THAT HE WAS DIGGING CAVING IN — RISK OF EMPLOYMENT. — 1. In the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for his servant to perform his work in, or to provide safe appliances for him to do his work with, still when the risks of danger arising are incidental to the employment, and obvious to the servant, or discoverable by the exercise of ordinary care on the part of the servant, the neglect of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues in the employment.

2. When the danger is latent and concealed, and the facts are such that the master did not have any knowledge of it, and the facts are not such that the master, in the exercise of reasonable care, should have known of it, or should have been put upon an inquiry to ascertain the danger, the servant cannot recover for injuries arising from such danger. When the servant and master have a like knowledge and appreciation of the danger existing

in the employment, there can be no recovery of damages by the servant for injuries arising therefrom.

3. Where a workman digging a deep trench for a sewer, through soil the character of which he can observe, with full knowledge of the nature of his employment, and the manner in which it is being conducted, he cannot recover for injuries arising from dangers which were obvious to him, or which he could observe or discover in the exercise of ordinary care. He must show some facts from which the jury can infer or conclude that there was latent or concealed danger, of which the master had knowledge, or should have had knowledge, and from which latent or concealed danger the master failed to exercise reasonable precautions to protect him in his employment.

4. Under the principles of law well established, and heretofore universally applied, when there are no facts upon which reasonably and legitimately a liability can be based, it becomes the duty of the court either to order a judgment of nonsuit or direct a verdict in favor of the defendant.

(Syllabus by the Court.)

ERROR to Circuit Court, Essex County. From a judgment for plaintiff, defendant brings error.

DEPUE & PARKER, for plaintiff in error.

WALTER J. KNIGHT, for defendant in error.

LIPPINCOTT, J. — In this case Dominico Palo, the defendant in error, the plaintiff below, recovered a judgment in the Essex Circuit Court against Thomas J. Regan, the plaintiff in error, the defendant below. Upon this judgment a writ of error was sued out for a review in this court. In the trial court motion was made for nonsuit, and for the direction by the court at the close of the evidence on both sides of a verdict for the defendant. Both motions were refused, and errors have been assigned in respect to the rulings of the trial court upon these motions. At the close of the case of the plaintiff below the evidence showed that he was the servant of the defendant below engaged in excavating a deep sewer trench in Jersey street in the town of Harrison, when one side of the excavation caved, and buried the plaintiff, and injured him. He had been engaged to work and was working for the defendant on the day preceding the injury. The work of excavating the sewer trench had proceeded to a considerable extent before the accident and a portion of the sewer had been constructed therein, and the work was being continued. The excavation was being made ahead of the portions of the trench where the work of constructing the sewer with brick masonry was being carried on by other workmen. The general depth of the excavation was, when completed for the construction of the sewer, about fifteen feet. On the day of the accident, or the day preceding, the plaintiff, with other workmen, began the excavation of a new section or portion of this trench.

In doing this they commenced to dig at the surface, and had excavated to about the depth of ten feet, when one side caved in. This section was from forty-five to fifty feet in length. Along this line no bracing or sheathing had been placed to protect the sides of the excavation from caving. The evidence shows that on this work where this excavation was going on no shoring or bracing had been placed. On other portions of the work, after it had been excavated to certain depths, certain bracing had been put in, principally to protect the workmen who were engaged in the construction of the brick sewer in the bottom of the excavation from the caving or falling of the sides thereof. The plaintiff was about forty-three years old, and, so far as the evidence shows, or so far as any contention was made in this behalf, it does not appear that he was one inexperienced in or ignorant of the character of the work in which he was engaged. No claim for recovery was made on the ground that because of such reasons he was entitled to any instruction in relation to the dangers of the employment, or needed any warning in respect thereto. He testifies himself that he noticed the character of the soil through which the excavation was being made; that at the top, and for a little distance beneath the surface, it was hard earth; this continued half way down the excavation; below this was a gravel formation, and still lower down it was composed of quicksand. He observed that in the portion where the sewer pipes were being laid by other workmen the sides were shored up with planks. These facts conclusively appear from the evidence of the plaintiff and the evidence of other witnesses in his behalf. The street was thirty-six feet wide from curb to curb, and this sewer excavation was being made in the middle of the street. There is other evidence showing that to some extent the street was a filled-in street, and it was clearly apparent that the earth in some parts through which this section of the excavation was being made was quite soft in its nature. The evidence is quite conclusive that, without shoring or bracing the work was very dangerous. The evidence of the superintendent of the construction, a civil engineer, shows that it could be excavated only to about the depth of ten feet safely without bracing, and that the character of the soil and earth through which the excavation was being made was such as to render the work obviously dangerous, unless protected by bracing the sides of the trench. This was obvious to any one working in it.

These facts fully appear in the evidence on the part of the plaintiff. The caving which caused the accident and injury to the plaintiff commenced either in the middle or at the bottom of the trench, and proceeded upwards, and extended outwards into the side of the

trench some five or six feet. The earth as it was excavated from the trench was thrown up on that side a few feet distant therefrom. Some few years ago a water pipe had been laid in the street, about nine feet distant from and parallel with the excavation, and between four and five feet below the surface. It is not shown that this fact caused or contributed to the caving in of this trench or excavation in which the accident happened, nor is there any fact in the case from which even such an inference could be derived, or that the defendant had any knowledge of any such former excavation, or any fact brought to his knowledge which would put him upon any inquiry. It is entirely clear that the knowledge in this respect of the servant and master was equal and alike, and both were entirely ignorant of any danger existing in relation to this former excavation, and if it could be said that the defendant had failed to exercise reasonable care to keep the excavation in a safe condition for his workmen, it can be just as strongly urged that the plaintiff had failed to exercise ordinary care and observation to protect himself. Under the circumstances of this case it would have been very difficult for the learned trial justice to have submitted either question to the jury.

The evidence in behalf of the defendant, after the motion for nonsuit had been denied, does not materially vary the facts shown in behalf of the plaintiff. It is directed to prove the exercise of reasonable care on the part of the defendant in taking the usual precautions to protect his workmen from dangers arising from the work. The whole evidence shows that this work at this place was obviously of a dangerous character, and that all the dangers of this work were obvious to the plaintiff. The rule is that it is the duty of the employer to exercise reasonable care to provide a safe place for his servant to perform his work, and to adopt such means and appliances as will insure reasonable safety and protection to him. *Van Steenburgh v. Thornton*, 29 Vroom, 160. And in this respect the negligence of any one to whom this duty is delegated to be performed is imputable to the employer. *Id.*; *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. Rep. 619. But the application of this rule is emphatically modified by another one, and that is that if the risks of danger, whatever they may be, and however extraordinary they may be, are incident to the employment, and obvious to, or can be perceived by, the servant in the exercise of his senses and the use of ordinary care and circumspection, the servant is without remedy because of the master's negligence. A comparison of risks is not admissible in this State, and the question cannot arise whether the master was more or less to blame than his servant, where there is, on the one hand, negligence in this respect,

and on the other hand, a disregard of obvious risks. The application of these rules of law, now so well established, prevents a recovery in this case. The facts are not disputed, and they show that the excavation in itself was an obviously dangerous work. The excavation was both narrow and deep. The character of the soil through which it was being made was such that there existed a clearly obvious danger. Ordinary observation demonstrated this fact. The plaintiff saw that the excavation upon which he was working was not braced, nor was he in any wise protected from its danger. In the presence and with the knowledge of this danger he continued in the employment, and the circumstances by which he was surrounded, and which were plainly discernible to him, were such that he could not at all rely upon the presumption that the defendant had furnished a safe place for him to work. The sides of the trench, unsupported, were liable to cave at any moment. He saw the character of the soil, the width and depth of the excavation, and the place where the earth which had been excavated was placed, and he had equal, if not greater, knowledge than the defendant of the dangers of the work as it proceeded. The risk of danger from which he suffered was entirely apparent to him. He exercised the choice of going on with his work, taking these risks upon himself, and this position in law leaves him entirely remediless for his injuries. The case of *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. Rep. 380, has been much relied on by the defendant in error, but this case is clearly distinguishable from the one now in hand. In that case the evidence tended to show that the boss of the defendant knew, or, from the facts of which he had knowledge, should have known, of the existence of the parallel trench, which rendered the excavation in which the plaintiff was working dangerous, and the evidence was such that it was for the jury to determine whether the injury arose from this danger, which was entirely unknown to the servant, and against which it became the duty of the defendant to protect him, and in this respect, the negligence of the boss to so protect the servant was the negligence of his employer. It will be seen that in the case in hand no such facts appear as will permit the application of the principle which governed in the case of *Van Steenburgh v. Thornton*. The facts in this case are not such as to give rise to the question which was raised and discussed in the case of *Van Steenburgh v. Thornton*, and there are no facts upon which an inference can be based that any such cause operated to cause the caving in of this trench, or that the defendant knew, or ought to have known of the existence of the former excavation. In this respect, as to the existence of

the former excavation, or of any danger arising from it, both the plaintiff and defendant were without any knowledge whatever; nor were they in any position in which they ought to have known of it; and therefore no duty existed in relation to it, nor did any liability arise in respect to it on the part of the defendant. The conclusion reached is that there existed legal error in the refusal of the learned trial judge to direct a nonsuit, or a verdict for the defendant. The judgment of the Circuit Court is reversed, and a *venire de novo* awarded.

PERRY v. ROGERS.

Court of Appeals, New York, November, 1898.

MASTER AND SERVANT — SAFE PLACE TO WORK. — Though a master is required to furnish his servants with a reasonably safe place in which to work, the rule is to be construed with reference to the nature of the work and the place of its performance.

HAZARDOUS WORK — MASTER NOT OBLIGED TO CONTINUE TO KEEP PLACE SAFE. — When the place of employment has been made reasonably safe, considering the hazardous nature of the work, the master is not obliged thereafter to keep the place in that condition at every moment of the time during which the work is progressing and if through the carelessness of servants the place becomes dangerous and a fellow-servant is thereby injured, the master is not liable.

APPEAL from judgment, Supreme Court, General Term, Second Department, affirming judgment entered on verdict of jury.

THOMAS S. MOORE, for appellant.

F. W. CATLIN, for respondent.

PARKER, Ch. J. — We think this judgment must be reversed, because it does not appear that the injury sustained by the plaintiff was due in any degree whatever to the omission of the defendant to perform any duty which, as master, he owed to his servant, this plaintiff. The learned trial judge submitted the case to the jury upon the theory that there was some evidence tending to show that the defendant omitted to perform the duty the law charges upon all masters of furnishing a reasonably safe place in which the servant may work. But an examination of the evidence will show that it furnishes no support whatever to this view. Let us examine it: In July, 1894, the defendant, in pursuance of a contract with the city of New York was engaged in cutting down a ledge of rock on the bank of the Harlem river, work necessary to be done in order to construct the speedway. At the time the defendant commenced

the work this ledge of rock rose about 100 feet above the surface of the water, and the face of the rock was nearly at right angles with the river. The means employed in removing this rock was drilling and blasting. The work was commenced by drilling with steam drills a large number of holes, twenty feet deep on the top of the bank, and about eight or ten feet from the edge. In these holes an explosive was placed, and the explosion resulted in shattering the rock and throwing out most of the fragments for a space of about thirty feet in length, twenty feet in depth, and from eight to ten feet in width. The place thus cleared out was called a bench. Upon the seat of the bench after an explosion was left necessarily a large amount of stone, both fine and coarse, and about its sides and back would sometimes be left fragments of stone that had been partially but not wholly torn from their resting places by the force of the explosion. In order to provide a reasonably safe and convenient place for the steam drillers to prosecute their work requisite to the blasting out of a bench still lower down, it became necessary to clean from off the bench created by the last blast the stone and dirt that had settled there after the explosion, and men were required to climb up on the bench and so clean it off. Down at the bottom of the cliff there were some men called hand-drillers, who were at work making openings for explosives at about the height above the river required for the foundation of the speedway. That was the principal work of this defendant, but he was also required, when called upon by the foreman to do the work of a mucker, a name given to those who shoveled off the stone and dirt that accumulated on the benches after explosions. On the 19th day of July, 1894, the plaintiff was directed by one Bundy, who was the foreman in charge of the men, to go up on the bench, which was then about forty feet above the roadway, in company with Washington and Davis, for the purpose of cleaning it off. While the plaintiff was thus engaged a large stone fell out of the wall, at a place six or seven feet above the seat of the bench, struck plaintiff's leg and crushed it so badly that it had to be amputated between the knee and the ankle.

While there was evidence tending to show that the plaintiff was actually prying out smaller stones that constituted the foundation of the stone that fell upon him, and thus it was caused to fall by his own act, there was also evidence pointing in the other direction, and, therefore, we must assume that it fell without being touched by the plaintiff, and that the cause of the accident was a blast that took place some two or three days previously. At that time the master was not present; a man named Ryan was the superintendent

of the whole work, and Wilbert Bundy was the foreman in charge at this point. Now, let us see what are the master's duties. He must provide a reasonably safe place in which the servant may prosecute his labors — not a "safe place," as the learned court said in charging the jury. The law is reasonable and does not require impossibilities, and work along any part of the face of this precipice of 100 feet in height could not in the very nature of things be in a safe place. In addition to the dangers of the situation, there were those incident to the use of high explosives, which were required to throw out such large quantities of rock. The master could not provide a place other than the precipice itself in which to prosecute this work; the next step was to furnish proper appliances, and it is conceded that he did so; his third duty was to employ competent and skilful men to work with this plaintiff in the discharge of the hazardous employment in which all were engaged, and the competency of the other servants of the defendant is not at all questioned. The rules referred to are those that point out the duties a master owes to a servant such as this plaintiff was, and we readily see it has not been made to appear that the defendant failed to perform any duty. But the learned trial court was of the opinion that the duty of the defendant to provide a reasonably safe place for his workmen was continuous, so that in every change in the surface of this great ledge of rock, whether occasioned by blasting out a bench or shoveling off the crushed and broken stones, the master's duty of providing a reasonably safe place for his workmen at once attached. But although the particular act of omission or commission causing the injury may be that of a fellow-servant, for whose negligent acts the master is not responsible in law, as the master's duty cannot be delegated, the respondent contends that the rule is in effect overborne in such a case as this. But it has not been understood to be the rule in this State that, in the performance of work of this character, the master, after making the place in the first instance reasonably safe for the prosecution of the work, has any duty to perform other than in the furnishing of safe appliances and the employment of competent and skilful employees. Under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts before this have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the neglect of a competent co-employee. Such an attempt was made in the case of *Armour v. Hahn*, 111 U. S. 313; but it was there held that the obligation of the master to provide a

reasonably safe place and structure for his servants to work upon does not oblige him to keep the building they are engaged in erecting in a safe condition at every moment of their work so far as its safety depends on the due performance of that work by them and their fellow-servants. The facts of that case were briefly these: Carpenters in charge of a foreman, and bricklayers, all employed by the owner through his superintendent, were engaged in the erection of a building with a cornice supported by sticks of timber passing through the wall (which was thirteen inches thick), projecting sixteen inches, to be bricked up at the sides. When the wall had been bricked on a level with, but not yet over the timbers, the foreman of the carpenters directed two of them to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In so arranging the joist, a carpenter stepped on the projecting part of one of the timbers, which tipped over, whereby he fell and was hurt; a recovery was not allowed.

In *Loughlin v. State of New York*, 105 N. Y. 159, the plaintiff an employee of the state, was engaged with others under the direction of W., the captain of the state boat, in taking clay from the bank and loading it on the boat. W. so loosened the bank of overhanging earth that it fell upon the plaintiff while he was digging under it and injured him. It was held that the cause of the injury was the negligence of the captain, who was a co-servant, and, therefore, the state was not liable.

In *Hussey v. Coger*, 112 N. Y. 614, the plaintiff's intestate, who was in the service of the defendant, although actually employed by the superintendent, was engaged in the making of repairs in the hold of a vessel. It became necessary to uncover a hatchway in the main deck, and the superintendent directed the foreman to have it done. As the hatches were heavy, two men were sent up to do the work and a third approached with the intention of assisting, but the superintendent, without waiting for him, directed one of the employees to remove the hatchway; he lifted one end and pulled the other from its resting place, when it was wrested from his hands, striking the plaintiff. The holding was that the master had not omitted the performance of any duty; that he had provided a skilful and competent man to superintend the work, a sufficient force with all necessary means and appliances to perform it, and a safe place free from inherent dangers in which to carry it on, and that he was not chargeable with the consequences if the place for work was made dangerous only by the carelessness and neglect of a fellow-servant or for the negligent manner in which the servants used the tools and materials furnished them for their work. This case is

clearly within the decision of this court in the case of *Cullen v. Norton*, 126 N. Y. 1. In that case the place of employment was a quarry underground, from which rock was being taken to be used in the manufacture of cement. This rock was excavated by means of blasting, in the performance of which work holes were drilled in the rock and subsequently explosives inserted. After a blast it was found by the foreman in charge that one of the charges had not exploded; a further examination showed that the fuse was unconsumed, but he omitted to remove it and put the plaintiff's intestate at work drilling about thirty feet distant. Shortly afterwards the fuse caught fire and the charge exploded, causing C.'s death. There the question was presented and decided whether the master was chargeable with neglect of duty, in that the quarry was not a safe place to work in at the moment of the explosion. It was held that the defendant discharged his duty when he furnished a quarry which was at that time as safe a place to work in as quarries generally are, and certainly free from the dangerous substance which subsequently caused the accident; and this court also held that, having performed this duty and selected a competent and skilful foreman and co-employees, the master's duty had been performed, and he was not liable for the manner in which the persons so employed should themselves perform their work. The court pointed out that the manner of performance of each of the various details of the work, by which, as a whole, it is conducted, rests necessarily upon the intelligence of the servants intrusted with it. Said the court: "It can't be that every time a blast was exploded and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in filling a duty to furnish a safe place to work in."

So, in this case, the master furnished everything that he was obliged to, including competent employees and a skilful foreman, and if there was any negligence on the part of any one other than the plaintiff, it was that of the foreman in omitting to give the plaintiff notice to pry off the piece of rock that fell and hit him, instead of going to work directly under it; but in this omission he was not acting in the place of the master; it was an ordinary detail of the work in which the plaintiff, the foreman and the others were engaged. They were to clean off this bench and make it a safe and convenient place for the steam-drillers to work, and it necessarily included the removal from the side walls of loosened fragments of rock that threatened to fall; but this the plaintiff apparently did not think of doing, nor did it occur to the foreman that there was

danger, or, if it did, he omitted to speak about it. In that omission he may have been negligent, but it was the negligence of a fellow-servant, although, in the performance of the work he was the plaintiff's foreman, for it was not the master's duty to tell the plaintiff to take down threatening fragments of stone, made dangerous by the plaintiff or his co-employees, before working under them, or to take them down for him. It formed one of the many details of the work incident to the removal of this rocky cliff, which the defendant had a right to intrust to a skilful foreman and competent workmen, after providing them with the necessary and proper machinery, appliances and tools.

The cases to which we have referred have been lately approved in *McCampbell v. C. S. Co.*, 144 N. Y. 552, and *Kimmer v. Weber*, 151 N. Y. 417-422.

The judgment should be reversed and a new trial granted; costs to abide event.

All concur, except O'BRIEN, BARTLETT and VANN, JJ., dissenting. Judgment reversed.

NEWMAN V. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, First Department, August, 1898.

NONSUIT — VARIANCE. — In the absence of a claim that the defendant was misled he is not entitled to a nonsuit upon failure of the plaintiff to prove the acts alleged in the complaint as constituting negligence where he proves others, without objection, which present a presumption of negligence on the part of the defendant.

HORSE INJURED IN TRANSIT BY NEGLIGENCE OF CARRIER. — In an action for damages against a railroad company for injuries to a horse being carried in one of their cars, a presumption of negligence on the part of the company was raised where it was proved that the injury was occasioned by a sudden stopping of the car so violent that a wooden bar in front of the horse was broken in two, and two halters secured to the top of the car were snapped and the horse thrown down and his back broken, and that employees of the company at once entered the car to see if any injury had been done.

APPEAL from judgment, Supreme Court, New York County, dismissing complaint.

JAMES M. KERR, for appellant.

HENRY G. WARD, for respondent.

PATTERSON, J. — This action was brought to recover damages for injuries to a race horse, the property of the plaintiff, while such horse was in the custody of the defendant, a common carrier, and was being transported from Jersey City to Gloucester, in the State of New Jersey. At the time the horse was put upon the defendant's car a receipt or bill of lading was handed to the plaintiff, by the terms of which the defendant was exempted from liability for injury to the animal, except such as should arise from gross negligence. One of the defenses is based upon the terms of that receipt, which was put in evidence upon the trial and forms part of the proofs. It was shown by the plaintiff that the horse was placed in a car which had been prepared for its reception, pieces of timber or joists having been arranged to form a stall, one piece of joist being placed cross-wise in front of the horse. The animal was tied with a halter, and a rope running from each side of its head to the top of the car. When the train, of which the car formed a part, reached Newark, in New Jersey, it came to a sudden stop. The horse was thrown forward with violence against the joist in front of it, and the joist broke. The ropes by which the horse's head was secured parted, and the horse fell. Its back was broken, and when the train reached Gloucester it was necessary to kill the animal before it could be removed from the car. At the close of the plaintiff's case the complaint was dismissed on the ground, apparently, that negligence of the defendant or its servants was not shown, and this appeal is from the judgment dismissing the complaint.

The contract was made and was to be performed in the State of New Jersey, and the plaintiff insists that, to entitle him to recover, it was only necessary for him to show the defendant's undertaking to transport the horse, its delivery for transportation, and the fact that it was injured while being carried. That view of the case cannot be sustained upon the plaintiff's complaint. He has sued for negligence only, and he has stated in his complaint the facts constituting the alleged negligence and the proximate cause of the injury to the horse. It is alleged that the defendant did not perform its undertaking and duty as a common carrier safely to transport the said horse of the plaintiff from Jersey City to Gloucester, but, on the contrary, the defendant, its servants and agents, in violation of its said undertaking and duty, so wrongfully, carelessly, negligently, and unskillfully managed, controlled, and operated its freight car, etc., that while the said defendant, its agents or servants, were shifting or taking on cars at Newark, N. J., during the trip from Jersey City to Gloucester aforesaid, the said car containing the plaintiff's said horse was caused to collide with and struck against

other cars of the defendant, in such a violent, unskilful, careless, and reckless and improper manner that the plaintiff's said horse was thrown down in the car, its back was broken by reason of the force of the shock of the said collision, and it became necessary to terminate its life to relieve it of its misery, and because thereof the said horse was thereby rendered worthless to the plaintiff.

The action, therefore, is one purely for negligence, and, upon a strict trial of the cause, the plaintiff might not have recovered, unless he proved the allegations of his complaint substantially as they were made. There is no proof in the record of any such particular carelessness as that charged in the complaint to be the proximate cause of the injury. It was not shown that there was any shifting of cars, nor that there was any collision. It has been held that where, in a complaint, the proximate cause of an injury is alleged to be one thing, proof of something else as the proximate cause is not allowable under objection; and that where an objection is properly taken to proffered evidence of some proximate cause other than that alleged in the complaint, and there is no amendment of the pleading, a judgment entered upon a verdict based upon such evidence will be reversed. *Woolsey v. Trustees, etc.*, 69 Hun, 489, 23 N. Y. Supp. 410, and cases there cited. But the peculiarity of this case is that, although no evidence was given of the proximate cause stated in the complaint, testimony came in, without objection, of a cause to which the injuries to the plaintiff's horse are to be ascribed. One of the witnesses swore that he was in the car in charge of the horse for the plaintiff; that the train was proceeding at a rapid rate of speed, and "it came to a stoppage all at once, and the horse that fell was riding forward, and just as soon as the train came to a stop the horse fell across my legs, and just as soon as I could I got them from under him, and by that time the train came to a standstill, and the trainmen came into my place to look if anybody was hurt, and they looked in and asked if anybody was hurt and I said, 'Yes; it looks like it;' so they got in and tried to get the horse up." The same witness testified that the ropes referred to broke, and the joist broke. "The joist came in two pieces — open in splinters." That evidence, such as it was, of the occurrence, indicated that it was the sudden stopping of the train that caused the injury. The horse was riding with his head towards the locomotive, and the inference is plain that, by the sudden checking of the momentum of the train, it was thrown forward with so much force as to break the barrier in front of it, and the ropes by which its head was secured. That was an entirely different cause, so far as the specification of negligence is concerned, from the one alleged

in the complaint, and therefore there is a variance between the proof and the allegations. As said before, if this had been objected to in time, or if a motion had been made to strike it out, it could have had no influence in the case; but it remained in the case, and, being in support of the general allegation of negligence, it could not be disregarded. The Code of Civil Procedure provides for such a case. Section 539 of that code declares that a variance between an allegation in the pleading and the proof is not material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court, and thereupon the court may, in its discretion, order an amendment. There is nothing in this record to show that the defendant was misled in any way by this evidence. No claim to that effect was made. The evidence was allowed to stand as the plaintiff's proof of the facts relied upon as establishing negligence, which was the gravamen of his action. The motion to dismiss the complaint was made on the ground that the evidence failed to show any negligence on the part of the defendant, and that motion was granted. We think the testimony above referred to, of the attendant who was in the car in charge of the horse, was sufficient to make it incumbent upon the defendant to show something in exoneration or excuse. The train was going at a rapid rate. The horse had been carefully secured in the stall. In front of it was the barrier above described, and the horse's head was secured by ropes, in the manner indicated. The train stopped so suddenly that the direct effect of stoppage was to throw the horse forward with such violence as to break the joist in two pieces, and snap the ropes by which its head was secured. That condition of the evidence speaks for itself, and presents one of those cases in which a presumption arises that, with proper management of the train, in slackening its speed, such an extraordinary result could not have occurred. The cause of action alleged in the complaint must be regarded as one purely in negligence, although a contractual relation existed between the parties, and here, as in all actions of negligence based upon alleged misconduct of servants in the operation of machinery of trains, the burden of proof is upon the plaintiff to establish the negligent acts by a preponderance of evidence. But that obligation of a plaintiff is met when evidence is given sufficient to raise a presumption of negligence, and that presumption may arise from proof of a state of facts showing a situation which could not have arisen but from the existence and operation of some abnormal cause. The rule is well stated

in a few words in the opinion of the court in *Cosulich v. Oil Co.*, 122 N. Y. 127, 25 N. E. Rep. 261: "Sometimes the duty which the defendant owes to the plaintiff is of such a nature that proof of the happening of the accident under certain circumstances and given conditions will be of such legal value as to afford presumptive evidence of negligence, and cast upon the defendant the burden of explanation." It is true that this rule has been applied most frequently in cases involving injuries to persons, and that is especially noticeable in actions against carriers. But it is not to be confined to such cases. It is a rule of evidence applicable to the establishment of the affirmative of an issue where negligence is the foundation of the action. Whether the injury is to person or to property can make no difference as to a rule which relates exclusively to a presumption arising from proven facts. It is doubtless true that such surrounding circumstances must be shown as necessarily give rise to the presumption, and I know of no better statement of the rule than that formulated in *Scott v. Docks Co.*, 3 Hurl. & C. 596, viz.:

"There cannot be a recovery without reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care" (1).

The circumstances of the occurrence giving rise to this action are of the most unusual character. A horse, firmly secured in the manner described, is, by the sudden stopping of a train, thrown forward with such violence as to break the guards and barriers by which it is secured, and sustains fatal injuries. The violence was so great that the train hands, immediately the train stopped, went about to make inquiry whether any one was injured in the car. If there are any cases in which a presumption of negligence arises against a carrier of animals, the facts here shown present one of them.

What, then, is the practical situation? The plaintiff sues for damages caused by negligence. He charges certain acts as constituting that negligence. He does not prove them, but, without objection, shows other facts which give rise to a presumption of

2. In *Scott v. London & St. Katharine Docks Co.*, 3 H. & C. 596, the plaintiff proved that he was a customs officer and while, in discharge of his duty, he was passing in front of a warehouse in the docks, six bags of sugar fell upon him. *Held*, to be reasonable evidence of negligence.

negligence. The defendant does not claim to have been misled by that evidence. A nonsuit is granted apparently on the ground that no evidence of negligence was given. In my judgment, that was error. If the point of variance had been taken, an amendment could have been allowed, in the discretion of the court.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur. RUMSEY, J., in result.

GOLDEN V. SIEGHARDT.

*Supreme Court, New York, Appellate Division, First Department,
August, 1898.*

TRENCH CAVING IN — NEGLIGENCE OF FELLOW-SERVANTS. — A contractor engaged in making street excavations is not liable for an injury to an employee occasioned by the side of the trench caving in below the point where the side planking ends, where it was shown that the employee's fellow-workmen were supplied with proper materials for planking the sides of the trench, and the cause of stoppage of the driving of the planks was a stone that projected and that might easily have been removed by digging it out.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff.

CHARLES C. NADAL, for appellant.

FRANK HERWIG, for respondent.

RUMSEY, J. — The action was brought to recover damages for injuries sustained by the plaintiff while working as a laborer in the employ of the defendant on the 14th of July, 1895. The defendant was engaged in the construction of a sewer at St. Nicholas avenue, between 137th and 141st streets, in the city of New York. As a part of this work, it was necessary to dig a trench along the avenue to the depth of fourteen or fifteen feet. The plaintiff had been engaged in this work for a couple of weeks at a different place than that where the accident occurred. On the day he was hurt he went to work near 141st street at a place where the trench had already been dug to a considerable depth, but where it was necessary to dig it deeper. At the place where the plaintiff was digging, the trench went through made ground, and it was necessary to sustain the sides so that they would not cave and fall upon the workmen. The manner in which this was to be done was well understood by the plaintiff, and was explained by him in his testimony. He said, substantially, that, after the ground had been excavated to the depth of a couple of feet, stringers of plank running horizontally were put

on each side of the trench, and held there by braces extending from one to the other across the trench, and planks were driven perpendicularly between these stringers and the wall, down to the bottom of the trench. He said, further, that it was customary to dig down two or three feet, and then drive down planks, and then dig down two or three feet, or four or five feet, and then drive the planks down again. The sheet piling was put in in that way. He testified, further, that if, in the excavation, they came to a rock sticking out of the side of the bank, while they were driving down the sheet piling, of course the piling had to stop above that rock, because it could not be driven through the stone. That, he said, was the condition of the place where he was at work. He testified that the sheet piling had been provided at this place, and had been driven down until it reached the top of a large stone projecting from the side of the trench. The plaintiff was at work in the trench opposite the stone, and, without taking any precautions against its fall, he dug the trench deeper below it, and while he was thus engaged the earth caved in, and the stone fell upon him, and seriously injured him. This was the plaintiff's own statement of the manner in which the accident happened. It was made to appear, and was not disputed, that the sheet piling was usually inserted and driven into its place in the trench from time to time by the laborers who were employed in digging, and that at this time and place the planking had been provided. It had been put in place, and the fall of the earth took place solely because the planking had not been driven to the bottom of the trench. It is quite true that just at the place where the earth fell a stone projected from the bank in such a way that, while it was there, the piling could not be driven past it; but the plaintiff was aware of that fact, which appears from his testimony, and there is no suggestion that it would have been at all difficult to dig the stone out of the bank, and then drive the piling down along the side of the trench to the bottom, before continuing the digging. It appears affirmatively, however, that the plaintiff, although he was aware of the location of the stone, took no steps to protect himself against it, or to avoid it, but was at work by the side of it when the earth fell. There is no doubt that, if the shoring or sheet piling had been continued, the earth would not have fallen. In this state of facts, the court was asked to charge that the shoring or sheet piling of the trench was a detail of the work, and, if the jury find that the accident was due to the failure on the part of the foreman or Roberts (who was a fellow-laborer) to shore or sheet pile the trench, the plaintiff cannot recover. This the court declined to charge, and in this refusal we think there was serious error.

The rule is well settled that it is the duty of the servant to attend to all details of the work which accompany its performance, and, if an accident happens because of his failure to attend to that part of the work, the employer is not responsible if he has used reasonable care to furnish the necessary materials to enable the laborer to do the work properly. *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. Rep. 905; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. Rep. 1017. When anything connected with the work, is an essential part of its performance, is done by persons who are engaged in the prosecution of the work, and is necessary to be done to insure the safe completion of the work, that thing is a detail of the work, within this rule. Especially is this so when the work itself is the making of a place in which it is to be done. Where that is the case, the rule which requires the master to provide a reasonably safe place for his servants in which to do their work has no application. If, in the doing of that work, the place becomes unsafe because the servant neglects to use the means which are customary, and which are furnished by the master, to protect himself, it is his own fault, and he cannot charge his employer with negligence, and thus render him liable for the damages which result. *Cook v. Railroad Co.*, 119 N. Y. 653, 23 N. E. Rep. 1150, cited by Finch, J., in *Kranz v. Railway Co.*, 123 N. Y. 5, 25 N. E. Rep. 206; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371. It is unnecessary to accumulate authorities upon this point, for the rule must be regarded as thoroughly well settled. The defendant, therefore, was entitled to the charge which he requested, and for the refusal of the court to give it this judgment must be reversed. It is unnecessary to consider any other questions in the case.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

TAYLOR V. NASSAU ELECTRIC RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, Second Department, July, 1898.

STREET RAILROADS — ACCIDENT TO CAR — REFUSAL TO TRANSFER PASSENGER TO ANOTHER CAR. — A passenger who enters a street railroad car for the purpose of being carried between two points is entitled to be so carried with reasonable speed and safety, but the fact that the car breaks down does not give him a right to transfer himself to another car,

and upon expulsion therefrom for refusing to pay another fare the company does not render itself liable therefor, but the passenger's remedy is an action for the company's breach of contract.

APPEAL from judgment, Supreme Court, Kings County, entered on dismissal of complaint.

D. W. PERKINS, for appellant.

JOHN F. BRENNAN, for respondent.

WOODWARD, J. — This is an action for damages alleged to have been sustained by the plaintiff by reason of his ejection from one of the cars of the defendant, which car he had entered for the purpose of continuing his journey, which had been interrupted by an accident. The undisputed facts are that the plaintiff entered one of the defendant's cars to be taken to his home, near Coney Island. He paid his fare, and became entitled to ride from the point of entering the car to his destination. After going a short distance, the car became disabled, and was run onto a switch for repairs. While thus standing upon the switch, several cars of the defendant passed, but there was no offer on the part of the defendant to transfer the plaintiff. Subsequently, a second car of the defendant was run in onto the switch, and repairs upon the first car were suspended while the second car received the attention of the workmen. The plaintiff (who alleges in his complaint that he had an important business engagement in New York, which he was unable to meet, and by reason of which he suffered loss in the amount of \$3, which loss is conceded by the defendant), being anxious to reach his destination, stepped from the car in which he had paid his fare to the second car of the defendant, and, in the presence of the superintendent of the defendant and its conductor, took a seat upon the same. He was told to keep his place in the delayed car; that, if he rode in the second car, he would be obliged to pay another fare. He refused to return to the car on which he had paid his fare, or to pay a second fare; and, because of such refusal, he was ejected from the car in which he had taken his seat. He was subsequently taken upon one of the cars of the defendant to his destination without further cost. At the close of the plaintiff's evidence a motion was made by the defendant to dismiss the complaint, on the ground that the plaintiff had failed to make out a cause of action. This motion was granted, and, from the judgment entered, the plaintiff appeals to this court.

It is unnecessary to determine at this time whether the plaintiff was entitled to go to the jury upon the main question. The motion of the defendant was to dismiss the complaint upon the ground that the plaintiff had established no cause of action, when in fact the

defendant had conceded that the plaintiff had sustained damages to the amount of \$3 by reason of the failure of the defendant company to carry him to his destination in time to permit him to meet his engagement in New York. Clearly, the plaintiff had established a cause of action in so far as the conceded damages are concerned, and it was reversible error for the trial court to dismiss the complaint.

In view of the facts in this case, and the contention of the plaintiff as to the principal cause of action, it may be proper to say that we are unable to find any authorities in this State which would justify submitting the evidence to the jury. The plaintiff entered into a contract with the defendant to carry him between two points upon the line of railroad operated by the defendant, with reasonable speed, and in safety. The fact that one of the cars operated by the company met with an accident did not give the plaintiff any new rights. The defendant had a right to transfer him to another car if it thought proper to do so, but, because of the fact that the defendant did not elect to do this, the plaintiff gained no right to transfer himself. The defendant, by refusing to make the transfer, took upon itself the responsibility for its breach of contract with the plaintiff, but it gave the plaintiff no right to transfer himself.

As was said in the case of *Townsend v. Railroad Co.*, 56 N. Y., at page 301:

"But when the conductor in charge of the train explicitly tells him that he cannot retain his seat upon that ticket (a ticket which had been wrongfully taken up by the conductor of another train), that he must pay fare or leave the car, does it not amount to the same thing? He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong. He invites the use of the force necessary to remove him; and, if no more is applied than is necessary to effect the object, he can neither recover against the conductor nor company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace, instead of producing them. It will leave the company responsible for the wrong done by its servant, without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.

This, it seems to us, disposes of the question involved in the appeal of the plaintiff. He had notice that he could not retain his seat in the second car of the defendant upon the original payment of his fare, and the company, by neglecting or refusing to carry him within a reasonable time, simply became answerable for the damages which he sustained by reason of the failure of the defendant to carry out its contract. This much of liability the defendant admits.

The judgment of the trial court should be reversed. All concur.

HASSEN V. NASSAU ELECTRIC RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
November, 1898.*

PASSENGER STANDING ON RUNNING BOARD OF STREET CAR — SUDDEN JERK OF CAR — PASSENGER STRUCK BY POLE. — Where a passenger boarded an open street car the seats of which were filled, but there was standing room in the space between the seats, and the passenger remained on the running board where other passengers were standing, and his fare was accepted by the conductor without remark, and while so standing and the car was going at the rate of six miles an hour it gave a sudden jerk, caused by the sudden application of excessive motive power, which forced the plaintiff to break his hold with one hand and his body swung outward and struck a trolley pole, the plaintiff was not guilty of negligence, and the company was.

APPEAL from judgment, Supreme Court, Trial Term, entered on verdict for plaintiff.

HENRY YONGE (CLARENCE J. SHEARN, on the brief), for appellant.
JAMES C. CROPSEY, for respondent.

HATCH, J. — The plaintiff boarded the defendant's car at Coney Island for the purpose of being transported to the borough of Brooklyn. The car was an open car, with seats running across and a running board upon the side. It was very much crowded, having from seventy to ninety passengers. All of the seats were filled, and people were standing in the space between the seats, and also upon the running board. There was space between the seats, unoccupied, when plaintiff boarded, and he could have occupied such space within the car. He remained upon the running board, as did also several other passengers. His right so to remain was not questioned by the conductor of the car, nor was any request made by the conductor, or by any other person, that he occupy the

space between the seats. On the contrary, the conductor demanded and received the plaintiff's fare, and made no suggestion that it was an improper or dangerous place for him to ride. It is customary for passengers upon this line, when the cars are crowded, to stand upon the running board of the car. While riding in this position, and when the car was running at about six or eight miles an hour, it gave a sudden violent jerk, which the jury were authorized to find was occasioned by the sudden application of excessive motive power by the motorman. The sudden and violent character of the jerk caused the plaintiff to break his hold with the left hand upon the stanchion of the car, swing his body outward, in which position his head was brought in contact with a trolley pole at the side of the track, inflicting the injuries of which complaint is made.

It is contended by the defendant that the plaintiff was guilty of negligence as matter of law; that if he could, with slight inconvenience to himself, procure standing room between the seats of the car, he was bound so to do; and, as it was conceded that there was such space, the plaintiff must be deemed to have voluntarily remained in a place of danger, which defeats his right to recover. This question was raised by motion for a nonsuit and in the requests to charge. It may be conceded that a person would be chargeable with contributory negligence, in the ordinary operation of a car, if he stood upon a running board when he might obtain a safe place within the body of the car. But, under the circumstances of this case, we think that such proposition may not be affirmed as matter of law. It is well known that the space between these seats, when the latter are occupied, is quite narrow. With small people upon a seat, the space left might be occupied, with more or less inconvenience. With large people it may become a matter of extreme difficulty to stand in the space, and with some an impossibility. In all cases it is a place of discomfort, and disagreeable both to the person standing and to those sitting. The cars running from Coney Island to Brooklyn, at most times, are crowded within and without, in all available space. The defendant expects that this will be so; and, if it does not invite, it makes little effort, if any, to prevent such condition, and collects and receives fares from those sitting and those standing, indifferent as to the place where the passenger secures his foothold. Under such circumstances we think the question becomes one of fact to be determined by the jury, having regard to particular conditions. *Bruno v. Railroad Co.*, 5 Misc. Rep. 327, 25 N. Y. Supp. 511, affirmed 147 N. Y. 711, 42 N. E. Rep. 722; *Wood v. Railroad Co.*, 5 App. Div. 492, 38 N. Y. Supp. 1077. The court charged the jury in accordance with this view of the law, and,

upon the evidence, we think the submission was proper. The defendant was properly found guilty of negligence upon the testimony. Such finding was warranted by the evidence with regard to the sudden and violent starting of the car, which is shown to have disturbed the equilibrium of other passengers as well as the plaintiff. The defendant had accepted the plaintiff for carriage. It collected his fare, and knew the place he occupied upon the car. It was bound to know that the application of motive power in such manner as to cause the car to give a violent jerk was extremely hazardous, in view of the position of many of the passengers upon the car, and might result in injury. The jury were therefore authorized to say that it was a negligent act. *Dochtermann v. Railroad Co.*, 32 App. Div. 13, 52 N. Y. Supp. 1051 (1); *Schaefer v. Railway Co.*, 29 App. Div. 261, 51 N. Y. Supp. 431.

Upon the question of the extent of plaintiff's injuries the testimony was conflicting, and, while it is not as satisfactory as it should be, we are unable to find legal ground for disturbing the judgment. No other questions require attention. The judgment should be affirmed.

Judgment and order unanimously affirmed, with costs.

1. *Dochtermann v. Brooklyn Heights R. R. Co.*, (Appellate Div., N. Y., June, 1898), is reported in 4 Am. Neg. Rep. 689.

LYNE V. WESTERN UNION TELEGRAPH COMPANY.

Supreme Court, North Carolina, October, 1898.

FAILURE TO DELIVER TELEGRAM — EFFORT TO GET ADDRESS OF PARTY TO WHOM TELEGRAM SENT. — Where it appeared that the messengers of a telegraph company were in the habit of going to the back door of the post-office when the general delivery window was closed for the purpose of making inquiry as to the addresses of parties unknown to the company, and on this occasion the messenger found the window closed and saw a light in the office, but did not go back to inquire, and one of the clerks was in the office at the time, and could have given the address wanted, there was sufficient evidence to warrant a finding of negligence in failing to deliver the telegram.

DAMAGES — MENTAL SUFFERING. — Damages for mental anguish and suffering caused by the negligence of a telegraph company in delivering a telegram may be recovered, though the relation of the parties was not disclosed.

APPEAL from a judgment, Superior Court, Wake County, in favor of plaintiff.

ROBERT C. STRONG, for appellant.

SHEPHERD & BUSBEE, for appellee.

FURCHES, J. — The plaintiff is the widow of R. G. Lyne, who was called by her "Gregory." The plaintiff alleges: That at nine o'clock P. M. on the 23d day of October, 1897, J. B. Lyne, a brother-in-law of plaintiff, and a brother of her husband, sent her the following telegram: "Richmond, Va., Oct. 23, 1897. To Mrs. R. G. Lyne, care Mrs. Mattie Wortham, Raleigh, N. C.: Gregory met accident; not live more 24, 26 hours. J. B. Lyne." That this telegram was received at the office of the defendant in Raleigh, N. C., and that it was not delivered to her until one o'clock P. M., October 24th. That this delay in the delivery of the telegram was caused by the negligence of the defendant and its agents. That by and on account of said negligence she was unable to reach the city of Richmond until the morning of the 25th of October, and not until after the death of her husband. That said negligence caused her great pain and mental suffering, for which she demands damages in this action. The defendant admitted receiving the message, denied all allegations of negligence, sets up contributory negligence on the part of the plaintiff, and denies her right to recover, and especially denies her right to recover damages for mental anguish and suffering. It appeared on the trial that the message was received at the Richmond office at 10:10 P. M., October 23d, and at the Raleigh office at 10:28 of the same day; that it was put in the hands of Eugene Cole, one of the messenger boys of the defendant, for delivery; that he did not know the address or residence of Mrs. Wortham; that he examined the city directory, and did not find it there; that he then went to the hotels in the city, and failed to find it on their registry; that he then went to the post-office, where he was in the habit of going for such information, and found the general delivery window closed; that he saw a light in the office, but did not go to the back door to inquire for the address of Mrs. Wortham, but returned with the message, undelivered, to the Raleigh office of the defendant. It was in evidence that the delivery messengers of the defendant were in the habit of going to the post-office for such information, and that when it was after office hours, and the general delivery window was closed, they were in the habit of going to the back door of the post-office, and making the inquiry there; that one of the clerks of the post-office was in there at the time the messenger went to the post-office, and, if he had gone to the back door and inquired, the post-office clerk would have given the address

of Mrs. Wortham; that Mrs. Wortham resided at 110 Salisbury street, within a few hundred yards of the defendant's Raleigh office, but had only resided there a few months, and her residence was not known to the defendant. There was other evidence in the case, which we deem it unnecessary to give or refer to, as the case turns upon what we have given and the instructions of the court. There were some exceptions to evidence, and, without discussing these, it is sufficient to say they have been considered, and that we are of the opinion they cannot be sustained.

There are quite a number of prayers for special instructions. Some of them were given by the court, and some were refused, except as covered by the charge of the court; and we are of the opinion that the charge of the court gave all the defendant's prayers for instruction which the defendant was entitled to, and that the charge was a correct exposition of the law. It is not necessary that the court give its charge in the language of the prayers, even when the prayers are proper, if they are given in substance. *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. Rep. 427.

The defendant contended that it was not guilty of negligence in delivering the telegram; that the residence of Mrs. Wortham was not known to defendant, and that defendant had exercised due diligence in its endeavor to ascertain the same. But it must be admitted that there is some evidence of negligence, or a want of due diligence. This is disclosed by the defendant's witness Cole, who testified that he went to the post-office to obtain this information, and that the general delivery window was closed, but that he saw a light in the post-office, and did not go to the back door to inquire. When it is in evidence that the defendant was in the habit of going to the back door for such information, in case the general delivery window was closed, and when it was shown by one of the clerks of the post-office that he was in the office at the time the messenger was there, and could have given him the desired information (the address of Mrs. Wortham) if the messenger had made the inquiry, this was not only some evidence, as in *Wittkowsky v. Wasson*, 71 N. C. 451, but such evidence as should go to the jury. The evidence seems to have been clearly and correctly submitted to the jury upon proper instruction from the court, and the verdict of the jury is binding upon us. We cannot review or reverse the finding.

It was contended by the defendant that the plaintiff could not recover damages for her mental anguish and suffering, even if it should be found that the defendant was guilty of negligence in delivering the message. But the doctrine has been so firmly settled

in this court that she can that we only feel called upon to cite *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. Rep. 1044; *Thompson v. Telegraph Co.*, 107 N. C. 449, 12 S. E. Rep. 427, and *Sherrill v. Telegraph Co.*, 109 N. C. 528, 14 S. E. Rep. 94.

The defendant further contended that, if it be held that a plaintiff may recover for mental anguish and suffering, the plaintiff in this case cannot do so, for the reason that the telegram does not disclose the relation of the parties — does not disclose that “Gregory” was the husband of the plaintiff — and that, as the telegram does not show this, it cannot be shown in evidence. We cannot sustain this contention. The relation of the parties was not disclosed in *Sherrill v. Telegraph Co.*, *supra*: “Tell Henry to come home. Lou is bad sick.” Nor was it disclosed in *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, and it was held in that case that the plaintiff could recover for mental anguish and suffering. That case contains a very clear and interesting discussion of the matter. The telegram in that case is as follows: “To F. E. Adams, Athens: Clara, come quick. Rufe is dying.” The same contention was made in that case that the defendant makes in this, and the court say, among other things, “that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. * * * When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.” We only quote briefly from this opinion, and recommend it to the attention of the profession. It seems to be sustained by the decision in *Telegraph Co. v. Lavender*, (Tex. Civ. App.) 40 S. W. Rep. 1035. From these opinions, and that of *Sherrill v. Telegraph Co.*, *supra*, we have no hesitation in holding that the plaintiff is entitled to recover for mental pain and suffering, if entitled to recover at all.

Having examined the record carefully, and finding no error, the judgment is affirmed.

MAST V. KERN.

Supreme Court, Oregon, November, 1898.

MASTER AND SERVANT — SUPERINTENDENT — FELLOW-SERVANT.

— In an action for injuries to a servant, whether the act of negligence was that of a fellow-servant depends upon the character of the act in the performance of which the injury arose and not the grade or rank of the negligent.

employee. If the act was one the master owed the servant, the master is liable; but if the act pertained only to the duty of an operative, the employee, whatever his grade, is a fellow servant of the injured servant.

SAME — EXPLOSION. — Where it appeared that the superintendent of the defendant assisted in preparing a hole for a blast and consulted with plaintiff as to whether he considered it free from the fire of a previous explosion, and afterwards ordered the plaintiff to pour in powder which he did, and was injured by an explosion that followed, the superintendent was a fellow servant.

APPEAL from judgment of nonsuit, Circuit Court, Coos County.

This action is brought to recover damages for an injury alleged to have been sustained through defendant's negligence. At the time of the accident which caused his injury, the plaintiff was, and for some months prior thereto had been, working for the defendant in a stone quarry at Coos Bay, engaged with other employees in excavating and removing rock by blasting, under the direction and supervision of one West, who was the superintendent and manager, with power to hire and discharge employees. On the day of the accident the plaintiff and a fellow-workman had drilled a hole in the rock, preparatory to putting in a blast; but, before loading it, the superintendent dropped in the hole two or three sticks of giant powder, which he caused to be exploded for the purpose of drying it out. After waiting a few minutes for any fire which the powder might leave in the hole to expire, West inquired of plaintiff whether he thought it was ready to load, and the plaintiff replied, "I don't know whether it is or not." West then said, "I guess it is all right; we will try it," and poured some powder into the hole; and, as it did not take fire, he said he thought it was safe, and directed the plaintiff and his fellow workman to put in the black powder; and while they were engaged in doing so an explosion occurred, by which plaintiff received the injury for which he brings this action. The ground of recovery alleged in the complaint is that West was negligent in not waiting a sufficient length of time for the hole to cool after the giant powder had been exploded therein, and in not ascertaining whether there was any fire remaining in the hole, before directing the plaintiff and his fellow workman to put the black powder in.

E. B. WATSON, for appellant.

BEAN, J. (after stating the facts). — The motion for nonsuit was, it is stated in the briefs, allowed on the ground that when the plaintiff, with full knowledge of the situation, without protest or objection, undertook to load the hole as directed by West, he knowingly and voluntarily assumed the risks of a premature explosion; and

we are not prepared to say at this time that the court was in error in so ruling. *Brown v. Lumber Co.*, 24 Ore. 315, 33 Pac. Rep. 557. But, however that may be, the judgment of nonsuit must be sustained for the reason that the negligence of West, if any, was, under the circumstances, the negligence of a co-servant, for which the defendant is not liable. It is familiar law that a servant assumes, as one of the incidents of his employment, all risks of injury from the negligence of a fellow-servant, because the master cannot, by the exercise of the utmost care and caution, guard against such negligence. But the courts differ somewhat as to who is a fellow-servant, within the meaning of this rule. There are practically two lines of decisions upon the question. On the one hand it is held, adopting the superior servant criterion, that when the master has given to an employe supervisory control and management of his business, or some particular department thereof, such person, while so acting, stands in the place of the master, as to those under his direction and supervision, and for his negligence the master is liable. This is known in the books as the "Ohio doctrine," and was adopted in effect by the Supreme Court of the United States in *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; but that case has been very much modified, if not in effect practically overruled, by the subsequent case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914. Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employee. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employee to whom it is intrusted; but if it is one pertaining only to the duty of an operative, the employee performing it is a fellow-servant with his co-laborers, whatever his rank, for whose negligence the master is not liable. *McKinney Fel. Serv.*, § 43 *et seq.*; *Bailey, Mast. Liab.* 226 *et seq.*; *Wood, Mast. & S.*, § 438; 24 *Am. Law Rev.* 175; 25 *Am. Law Reg.* 481; *Crispin v. Babbitt*, 81 N. Y. 516; *McCosker v. Railroad Co.*, 84 N. Y. 77; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. Rep. 556; *Brown v. Railroad Co.*, 27 Minn. 162, 6 N. W. Rep. 484; *Ell v. Railroad Co.*, 1 N. D. 336, 48 N. W. Rep. 222; *Sayward v. Carlson*, 1 Wash. St. 29, 23 Pac. Rep. 830. Many other authorities could be cited to the same effect, but these are sufficient

to show the irresistible current of the decisions, as well as the ground upon which the doctrine rests and its application to given facts. And so is the logical result of the former decisions of this court, as the liability of the master for an injury to a servant, caused by the negligence of another employee, has always been made to depend upon the character of the act causing the injury, rather than the grade or rank of the offending employee. *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. Rep. 765; *Hartvig v. Lumber Co.*, 19 Ore. 522, 25 Pac. Rep. 358; *Miller v. Southern Pac. Co.*, 20 Ore. 285, 26 Pac. Rep. 70; *Carlson v. Railway Co.*, 21 Ore. 450, 28 Pac. Rep. 497; *Fisher v. Railway Co.*, 22 Ore. 533, 30 Pac. Rep. 425. It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow-servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employee to the same extent as if he had himself performed the act, or been guilty of the negligence. But when the master has performed his duty in this regard, and provided competent employees, a reasonably safe place to work, suitable materials, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises and is not liable to a servant for the negligence of another servant while engaged as an operative. It is true that from this doctrine results the conclusion that an employee may in certain instances occupy a dual position to his fellow-workmen. He may be a vice-principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master himself is required to perform, and a co-servant in the discharge of duties not personal to the master. But this conclusion is a logical one, and has been recognized and applied under many varieties of facts. See *McKinney, Fel. Serv.*, note to section 42. The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employee in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant,

engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employee who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence. "This," as said by Judge Dillon, "is a plain, sound, safe and practical line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine based upon the notion of 'grades' in the service or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagination of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges who made it seem to be able to 'find no end in wandering mazes lost.' " 24 Am. Law Rev. 189. Now, under this rule it is clear that defendant is not liable for the act of West in directing the plaintiff to load the hole, even if it was neglect; for he was not then engaged in the discharge of any duty which the master owed to the plaintiff, but was a fellow-servant, the risk of whose negligence was assumed by the plaintiff when he entered upon the employment. There is no pretense that West was not a fit and competent person to have charge of the work, or that the master was negligent in employing him, but the sole ground of liability alleged is the negligence of West in a matter not pertaining to any duty the defendant owed to the plaintiff. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

GOLDEN v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, Pennsylvania, October, 1898.

BOY PASSING BETWEEN CARS THAT BLOCKED STREET CROSSING AND INJURED BY THEIR SUDDEN MOVEMENT. — A pedestrian who finds a street crossing blocked by a train of cars and starts to pass through a break in the train beyond the crossing while the cars are not in motion is entitled to damages if the cars are started without warning, and he is struck and injured.

APPEAL from judgment, Court of Common Pleas, Philadelphia County, in favor of plaintiff.

GEO. TUCKER BISPHAM, for appellant.

A. S. L. SHIELDS, for appellee.

STERRETT, Ch. J. — On the afternoon of October 25, 1895, the plaintiff, then seven years of age, was returning southwardly from school to his home on the south side of Washington avenue, between Tenth and Eleventh streets; and when he came to the intersection of Tenth street and said avenue, he found the crossings blocked by defendant company's cars standing on its Washington avenue tracks. He then went southeasterly across the pavement to a point where there was an opening of about eighty feet between the cars, still standing on the track, and, proceeding to cross the street, through said opening, to his home, the cars were suddenly backed without any warning; and he was struck, knocked down, and sustained the injury of which he complains. Several persons who saw what occurred at the time testified in detail to the facts and circumstances leading up to the injury sustained by plaintiff. One of them testified, *inter alia*, that, when the train started to back, "the child was going across the street. I saw the train strike the child. It struck him somewhere about the shoulder, knocked him down, and the car came back on him. * * * The boy was about a foot from the car, going across, when the train began to move." He further testified that the cars had been on the crossing from twenty minutes to half an hour; that he heard no whistle or bell, or signal of any kind; and that there was no one near either end of these trains to warn people. Other witnesses for the plaintiff testified substantially to the same state of facts. It is unnecessary to refer in detail to the testimony of either of them. The plaintiff's evidence was quite sufficient to carry the case to the jury. It is true, the defendant's witnesses denied that the crossing was obstructed, denied that there was an opening between the cars where the child undertook to cross, and also denied that signals were not given, etc. If there was ever a case in which the conflict of testimony as to the material facts necessitated submission to a jury, this is one. It is impossible to consider the testimony on both sides without being convinced that the learned president of the court below would have committed a grave error if he had affirmed the defendant's third point, and instructed the jury, as therein requested, that, "under all the evidence in the case, the verdict should be for the defendant." It, therefore, follows that the second specification of error must be overruled.

We are clearly of opinion that the learned judge was also right in refusing to affirm the defendant's point recited in the first specification. If the jury believed the testimony of the plaintiff's

witnesses — and the fair inference from their verdict is that they did — there was ample evidence “ that the company defendant blocked the crossing of Tenth street at Washington avenue in an unlawful manner.” The point was, therefore, rightly refused.

When considered in connection with the context, there is no error in what purports to be an extract from the charge, embodied in the third and last specification. In saying that, we do not mean to intimate any doubt as to the correctness of the extract as it stands alone in the specification. It is explained and fortified by cognate portions of the charge. Near the conclusion of it, the jury were instructed thus: “ It is for you to determine, upon the evidence which you have heard, whether the cars were in motion when the boy attempted to pass through. If they were, the accident was a misfortune for which the company is not responsible. It is only responsible for starting its cars without warning, in case you find that the regular highway of Tenth street was blocked up at the time when pedestrians were, by reason of the blocking of the street, compelled to go around and go through the break. If you find that to be a fact — that Tenth street was blocked, and the little boy came up above Tenth, and tried to cross through the break at the time the cars were not in motion, and was run down by them — you may, on those facts, find a verdict against the company. If, however, you believe the little boy did not attempt to get through the break, but tried to crawl between the cars, or over the bumpers, or went in between them while they were moving, the company is not responsible.” As remarked in the outset, the case was clearly for the jury. It was fairly and impartially submitted to them, with instructions of which the defendant, at least, has no just reason to complain. There appears to be no error that would justify a reversal of the judgment.

Judgment affirmed.

KELLY V. COOK, CITY TREASURER.

Supreme Court, Rhode Island, October, 1898.

MUNICIPAL CORPORATIONS — UNLAWFUL ARREST BY POLICE OFFICER. — An unlawful arrest and imprisonment by a police officer of a city will not make it liable therefor, as such officer is not its agent or servant and the doctrine of *respondeat superior* is not applicable.

ARRESTED PERSON NEGLIGENTLY CARED FOR IN STATION. — A demurrer to a declaration was properly sustained where it was alleged

that the complainant was negligently cared for while temporarily confined in a police station, as such negligence did not render the city liable, since in caring for persons under arrest, the city discharged a public duty.

DEMURRER to declaration sustained.

WALTER J. BALLOU, for plaintiff.

ERWIN J. FRANCE, for defendant.

TILLINGHAST, J. — The declaration alleges, in substance, that on the 17th day of February, 1897, the city of Woonsocket, by Charles A. Hoar, a police officer and servant of said city, without authority of law, did arrest John H. Kelly (the plaintiff's intestate), and by its police officers, being servants of said city, did, without authority of law, confine said Kelly and deprive him of his liberty for fifteen hours in the police station in said city — said station being then and there under the control of the city — and thereupon upon the unlawful arrest and confinement of said Kelly, it became the duty of said city to exercise the utmost diligence in the care of said Kelly, in order that his bodily health might not become impaired while in said custody; that while so confined he became ill, and said city, wholly unmindful of its duty in that regard, neglected to provide for him; and that as a result of said neglect, said Kelly's illness increased and caused his death in said police station on the 18th day of February, 1897, although he was in the exercise of due care. Wherefore the plaintiff as administrator of the estate of said Kelly brings this action. The defendant demurs to the declaration on several grounds, but mainly on the ground that the city is not liable for the negligence, misconduct or wrongful acts of its police officers. It is conceded by the plaintiff that police officers appointed by a city to perform a public service are not its agents or servants so as to render it responsible for their unlawful acts or negligence while in the performance of such service, but are to be regarded as public or State officers, with such powers and duties as the State confers upon them, and that the doctrine of *respondeat superior* is not applicable. It is also conceded that said Charles A. Hoar was not the servant of said city in any other capacity than as one of its police officers. The plaintiff contends, however, that if the public service be the arrest and detention of persons, then police officers must have an appointment which will confer the power necessary to the performance of that service; otherwise they cannot be said to be public officers when they make an arrest. Stated more concisely, the plaintiff's claim is that the mere appointment of said Hoar as a police officer conferred no power upon him to make the arrest in question; that, in order to have clothed him with such authority, it was necessary that he should have been made a police constable.

Whether this contention is correct or not, it is not necessary for us now to decide; for, if said Hoar was authorized to make the arrest, plaintiff admits that he has no case. And, if he was not, then, it being conceded as aforesaid that he was not a servant of the city in any other capacity than as one of its police officers, which is undoubtedly the law, it follows that in making the arrest he was not acting within the scope of his authority, and hence was a mere trespasser. The mere fact, even if it be a fact, that said Hoar, in his capacity as a policeman simply, had no authority to arrest and detain plaintiff's intestate, did not have the effect to strip him of his character as a public officer, under the charter of said city. Pub. Laws, R. I., 1888, c. 728, sec. 4, cl. 2. For, whatever the extent of his authority might have been, he was unquestionably a police officer of said city, appointed to perform a public service. In appointing him, the mayor and aldermen were merely exercising one of the functions of government, in which the city had no particular interest, and from which it derived no special benefit or advantage in its corporate capacity. See *Wixon v. City of Newport*, 13 R. I. 454. And, this being so, he cannot be regarded in any sense as the agent or servant of said city, so as to render it liable for his acts. *Hafford v. City of New Bedford*, 16 Gray, 297; *Buttrick v. City of Lowell*, 1 Allen, 172; *Aldrich v. Tripp*, 11 R. I. 143; 2 Dill. Mun. Corp. (4th ed.), sec. 975; *Barbour v. Ellsworth*, 67 Me. 294.

But plaintiff argues that, if the city directed or authorized the acts complained of, the principle of *respondeat superior* applies. There is nothing in the declaration, however, which shows that the city either directed or authorized said acts. The allegation is that the city, "by its police officers, being servants of said city," committed said acts. It will at once be seen, therefore, that the whole question turns upon whether said policemen were the agents or servants of said city in the premises. And, as they clearly were not, there is nothing left upon which the action can be sustained. See cases cited in 19 Am. & Eng. Enc. Law, 558; *Maxmilian v. Mayor, etc.*, 62 N. Y. 160; *Goodnow, Munic. Home Rule*, 106, 107, 113-117.

The plaintiff says, however, that the gravamen of the action is the negligence of the defendant in caring for a man whom it unlawfully arrested and detained. This position assumes, in the first place, that the city made the arrest, which, as we have already said, is unwarranted, and, in the second place, that the city is liable in an action of this sort if it fails to take proper care of a person while temporarily confined in its police station. This ground is also

wholly untenable. In the temporary care of persons under arrest, the city, by its police department, is aiding in the enforcement of the laws, and thus discharging a public duty, for which it receives no pecuniary benefit, and for the manner in which it discharges this duty it is legally responsible to no one. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the people. *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. Rep. 614. Of course, it is to be presumed that the common dictates of humanity will prompt those in charge of the municipal affairs of a city to properly provide for persons under arrest; but that it should be held liable to an action in favor of a person who has been arrested, whether rightfully or wrongfully, on the ground that he has not received proper care and attention, is a doctrine which has not yet been incorporated into our municipal law. In the late case of *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. Rep. 812, it was held that a municipal corporation is not liable for negligently maintaining its lockup or prison in a defective and unfit condition, by reason of which a prisoner confined therein is injured. See, also, *Gilboy v. City of Detroit*, J. Smith's Cases Mun. Corp. 150; *City of Richmond v. Long's Adm'rs*, 17 Grat. 375; *Dill. Mun. Corp.* (4th ed.), sec. 977, and cases in note; *Mitchell v. City of Rockland*, 52 Me. 118; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402. As we have been unable to find any authority to the contrary of the doctrine above announced, and as the plaintiff has not referred us to any, there seems to be no occasion for a further consideration of the question.

Demurrer sustained.

JOHNSON V. GLIDDEN.

Supreme Court, South Dakota, October, 1898.

LIABILITY OF FATHER FOR TORT OF INFANT — RECKLESS USE OF FIREARMS. — Where it appeared that while the plaintiff was watering a colt on her premises the defendant's son, a boy thirteen years old, came along the road carrying a gun that was given to him by the defendant and the son discharged the gun in front of the colt that took fright and ran away and dragged the plaintiff, who became entangled in a rope, and she was injured, the defendant was liable when it was shown that the defendant knew that the son was negligent in the use of the gun.

EVIDENCE. — It was not error to admit proof of the manner in which such gun was used by the son on other occasions than the one in question, where defendant's knowledge of such acts was shown by other witnesses.

APPEAL from judgment, Circuit Court, Spink County, entered on verdict of jury in favor of plaintiff.

A. W. BURTT, for appellant.

H. G. WARNOCK, for respondent.

HANEY, J. — Plaintiff's cause of action is thus stated in her complaint: "1. That Ernest Glidden is the son of said defendant, and was on the 17th day of August of the age of thirteen years, living at home with his said father, and under his custody, care, and control. 2. That prior to the said 17th day of August, 1895, said defendant carelessly and negligently purchased and gave to said Ernest Glidden a certain firearm known as a gun, which said Ernest Glidden was in the habit of using in a careless and negligent manner, so as to endanger the life and property of persons about him, all of which was well known to this defendant, and who encouraged, countenanced, and consented to his carrying said gun and in so using it in said careless and negligent manner. 3. That on the said 17th day of August, 1895, this plaintiff was watering a colt on her own premises, when said Ernest Glidden came along with his gun, and, against the request of this plaintiff, carelessly and negligently fired said gun in front of said colt; that said colt thereby became frightened and ran away, and this plaintiff without any fault of her own, became entangled in a picket rope attached to said colt, and was dragged for a long distance over the prairie, and was severely injured, in that her flesh was badly bruised and lacerated, and her back was strained so, as she believes, to be permanently injured. 4. That by reason of said injuries she suffered great bodily pain, and was confined to her bed for a long time, and was and still is unable to do her housework or any work, and is, as she believes, permanently injured and otherwise greatly injured, and was compelled to spend \$100 for medical attendance, nursing, and help about the house, to her damage of \$5,000." The allegations of the complaint are denied, except as to the first paragraph, and defendant alleges that the plaintiff was guilty of contributory negligence.

Does the complaint state a cause of action? It was not assailed until the trial began, and it must be liberally construed. Our Civil Code provides that "neither parent or child is answerable, as such, for the act of the other." Comp. Laws, sec. 2620. It is a rule of the common law that "a father is not liable in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child." Schouler Dom. Rel., sec. 263. The allegations of the complaint connecting defendant with the injurious act of his minor child are these: 1. He purchased and gave him a gun; 2, the child used it

negligently; 3, the father knew he was so using it; and 4, he encouraged, countenanced, and consented to such negligent use. It may be conceded that it is not negligence per se for a father to furnish his son, aged thirteen years, with a gun, or permit him to use one, if the boy uses it with ordinary care, and the father is justified in presuming that it will be so used; but, if he knows that his son is using the firearm in such a careless and negligent manner as to endanger the life and property of persons about him, it is certainly his duty to interpose his parental authority, and prevent, if possible, a course of conduct on the part of his child which is likely to produce injury to others. In a case in Wisconsin, where two minor sons of the defendant came out of their father's house, and fired off a pistol, and shouted and so frightened the plaintiff's horses that they jumped suddenly forward and threw a person out of the seat, and injured her, the court employs this language: "It will be seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged firearms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge firearms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing; and, when an injury did happen from that cause, he was not only morally, but legally, responsible for the damage done." *Hoverson v. Noker*, 60 Wis. 511, 19 N. W. Rep. 382. The principle thus announced is applicable to the case at bar. If, as alleged, defendant's son was in the habit of using the gun given him by his father in a dangerous manner, and defendant knew of such use, it was his moral and legal duty to prevent a continuation of such conduct; and it is immaterial whether his knowledge was derived from seeing his son's acts of negligence, or from being informed of them by other persons. His culpability consisted in permitting his son to continue in a course of conduct which in its nature was likely to result in damage to those with whom his son came in contact. If he knew his child was using the gun recklessly, as an ordinary intelligent person he must have apprehended the natural consequences of such recklessness; and, as a good citizen,

he should have made a reasonable effort to prevent such consequences. On the contrary, it is alleged that he encouraged, countenanced, and consented to the manner in which his son was carrying and using the gun. We think defendant's objection to the introduction of any evidence under the complaint was properly overruled.

It follows from what has been stated that the court did not err in admitting evidence tending to prove that the son of defendant used the gun negligently on other occasions than that involved in this case. One of the material issues was whether he was in the habit of using the gun in a reckless manner, and the only way to establish such fact was by evidence showing how he acted when using it. Of course, it was necessary to show that defendant knew of his culpable conduct, but such knowledge could be established by other witnesses than those who testified concerning the acts of his son. The natural order of proof would be to first show acts of negligence, and then bring knowledge of any or all of such acts home to the father.

The charge of the court, taken as a whole, substantially conforms to the law as herein announced. As a preliminary and general declaration of a parent's liability, the court uses this language: "You will understand as a proposition of law that a father, as such, is not liable for the ordinary acts of his infant son." Standing alone and unqualified by other portions of the charge, this sentence does not correctly state the law, and the use of the word "ordinary" might mislead a jury; but the words quoted are followed by such plain and explicit directions regarding the facts necessary to a recovery by plaintiff that it is impossible to believe that the verdict was influenced by the preliminary statement given above. The language of the court is as follows: "In order to hold the father liable, you must be satisfied by a preponderance of the evidence that the boy had been repeatedly careless in the use of the gun, as claimed by this plaintiff. You must further find by a preponderance of the evidence that after Mr. Glidden, this defendant, the father, had been informed and notified of the fact that this boy was careless, negligent, and reckless in the use of this firearm, that he did, with knowledge of these facts, cause and he thereafter put the means of doing mischief in his hands, by permitting him to take this gun; then he would be liable and responsible for such damages the boy may have inflicted by reason of the careless use of the gun. Thus, you will see the necessary things for the plaintiff in this case to prove in order to recover are these: First, that she was injured as she alleges; that this injury was caused by reason of the carelessness and negligence of this boy; that the boy had been careless and negligent for some period of time before this; that the father had full

knowledge of this fact; and that, with full knowledge of this fact, he put the means of doing mischief in this boy's hands, by allowing him or permitting him to take this gun and go where he pleased with it. If all these facts are established, and, further, if it should appear that the plaintiff herself was without any negligence at the time of this accident, then the plaintiff would be entitled to a verdict at your hands for such damages as she may have sustained. If any of these essential facts are not established by the testimony in this case, then the plaintiff cannot recover, and your verdict should be for the defendant."

Finally, it is contended that the evidence is insufficient to sustain the verdict. In discussing this phase of the case it must be remembered that the jury were at liberty to believe the witnesses for plaintiff, and that every fair and reasonable inference must be drawn from their testimony which can be to sustain the verdict. Viewed in this light, the jury were warranted in finding that the defendant kept a shotgun in his house which his son was permitted to use whenever he desired, and that he had frequently used it prior to the accident in question; that the boy used it in a reckless and dangerous manner when plaintiff was injured, and upon at least two other occasions. In brief, they were justified in finding that the boy had used the gun for some time prior to the accident in a reckless manner, and that his use of it was permitted by the parent. There is sufficient evidence to establish all the elements of plaintiff's cause of action, provided defendant knew his son was in the habit of using the gun in a dangerous manner. The only evidence tending to prove that defendant knew of the manner in which the gun was used by his son is that of the plaintiff, who says: "I told Mr. Glidden that he would [should] take care of his boy; that his boy had been down there, and shot at the horses, and scared them loose; and he answered and said, 'Wherever there is a lake the boy has a right to hunt.' I told him that the boy shot after the horses; that is what I told him at the time." This is denied by defendant, but must be accepted as true by this court. If so, defendant was informed that his boy was conducting himself in a most reckless and unlawful manner. Upon receiving this information, in place of investigating the charge, with a view to prevent a continuation of his son's reckless conduct if found to be true, he seems to have sanctioned it; and the fact that such conduct continued indicates that he did nothing to prevent it. He was informed that his son was pursuing a course of conduct which in its nature was likely to produce injury to the persons and property of others; and we think the jury were justified in concluding from all the evidence that he not only failed

to exercise his parental authority to prevent a continuation of such conduct, but, by his own conduct, encouraged, countenanced, and consented to the course being pursued by his son. Such was evidently the view of the trial court and jury, and we are not inclined to disturb the verdict. All the assignments of error have received attention.

Finding no reversible error, the judgment of the Circuit Court is affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS v. OVERFIELD (1).

Court of Civil Appeals, Texas, October, 1898.

RIGHT OF PASSENGER TO ALIGHT AT INTERMEDIATE STATIONS DURING JOURNEY. — A passenger is not required to remain upon a train from the starting point to his point of destination, but may alight at intermediate stations for the time the train remains there for any purpose, whether such purpose is connected with the journey or not.

TRAIN NOT STOPPING AT STATION PLATFORM — PASSENGER FALLING INTO WATER AND COMPELLED TO CONTINUE JOURNEY WHILE WET. — Where the plaintiff alleged that in the night-time upon the train approaching a station, but before reaching it the porter announced it and opened the door for passengers to pass out; that in fact the train had not reached the station but was on a trestle, and the plaintiff not knowing it, and supposing the train was at the station stepped off and fell into some water and was drenched; that it being cold weather and the car cold, he asked the conductor for a stop-over, which was refused, and plaintiff not having sufficient money to buy another ticket was compelled to ride and caught cold, resulting in sickness and disability, the carrier's negligence was sufficiently charged (2).

APPEAL from judgment, District Court, Bexar County, in favor of plaintiff.

F. C. DAVIS and FLOYD MCGOWN, for appellant.

SUMMERLIN & WALLING and ED. HALTOM, for appellee.

JAMES, Ch. J. — Plaintiff made the following allegations, in substance: That he took passage on appellant's train at Taylor for Greenville, Tex., which route carried him through the town of Temple. That, on approaching Temple, appellant's porter called out "Temple," and opened the door to allow passengers to get on or

1. Rehearing in this case denied. *plaints, see page 51, of this volume, November 9, 1898. ante.*

2. For note on averments in com-

off, and thereupon the train stopped; and plaintiff being thereby led to believe that the train was at the station, got off, as he supposed, upon the platform, when in fact the train had not reached the station, but had stopped on a trestle; and it being night-time, and there being no lights, plaintiff, although exercising due care at the time, stepped out and fell into an excavation containing water, whereby he sustained bodily injuries, and all his clothing became drenched. That it was in January. That the car had been allowed to get cold, and his having to continue his journey under such conditions to his destination resulted in his severe sickness and permanent disability, for all of which he prayed damages. He alleged that he complained to the conductor of his drenched and cold condition, stating that he feared it would make him sick, and asked to be permitted to stop off until the next train, which was refused, and plaintiff, being without means to procure another ticket, was compelled to prosecute his journey. The petition alleged also that his injuries, which were set forth with detail, were caused by the negligence of defendant. He alleged that he desired to "temporarily leave said car at Temple," as his reason for attempting to do so. To the petition, defendant demurred, and here contends that it does not appear therein that defendant owed plaintiff any duty with reference to the station of Temple, in that it does not allege that plaintiff notified defendant's employees that he desired to get off at Temple, an intermediate station, and because it did not allege that he undertook to get off at Temple for some purpose essential to his journey, such as getting his ticket changed. There was another demurrer upon the ground that the petition has no express allegation that defendant "had been negligent either in announcing the station, or in stopping the train over a trestle, nor that the two acts concurring constituted the negligence which caused plaintiff's injuries." The latter ground of demurrer is not well founded. The petition charges that the injuries were occasioned by the negligence of defendant's servants, and sets forth the acts of its servants of which he complains as leading to his injuries. Therefore, the petition, by unmistakable intendment, if not expressly, charges those acts as negligence. This disposes of the third assignment of error.

As to the other ground of demurrer, we are of opinion that a passenger is not required to remain upon a train, from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. Getting off at intermediate stations, from motives of either business or curiosity, has been held not to deprive one of his character as a passenger, or of his right to precautions for his safety as

such. *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. Rep. 145. We conceive the correct rule to be that he remains a passenger, on getting off at intermediate stations, so long as his object in doing so is not inconsistent with the character of passenger. In this State it has been held that he loses none of the rights of a passenger in getting off at such a station to deliver a private message to a person on the platform. *Railway Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990. The refusal by the Supreme Court of a writ of error in the latter case, we think, settles against appellant the propositions made in its second, fourth, and ninth assignments of error. It also disposes of the fifth assignment, because it was immaterial what motive plaintiff had in alighting, as we will hereafter explain. If it should be held that the purpose of his getting off should have been more specifically alleged, still the special demurrer was not upon that ground, but upon the ground that it did not appear from the petition that he desired to get off for a purpose connected with the journey, and that it therefore appeared that defendant owed him no duty at that place in respect to egress. This ground of the demurrer was not good. We are of opinion that the defendant presumptively owes a passenger such duty in cases like this, where the injury is received in getting on or off a train at a station, and that the pleading need not, in such case, state the purpose for which the passenger leaves it, in order to state a case. But in the case we have before us — one where the injury is received in the very act of alighting at a regular station, not after he had alighted — the motive of the passenger is wholly immaterial; for the passenger has the undoubted right to alight at such place for the time the train remains there, or to leave the train altogether, if he desires, and while he is in the act of alighting he is clearly a passenger, and entitled to be treated as such.

There is no merit in the ninth assignment. If the evidence is consulted, it appears that plaintiff sought to get off at Temple because he thought he changed cars there. The seventh and eighth assignments criticize the first paragraph of the court's charge, but we consider them not well taken. The sixteenth assignment of error we dispose of by saying that plaintiff stated in his testimony that he owed the sum of \$40 for medical attention, qualifying his previous statement that it was about that sum.

The judgment is affirmed.

LISONBEE V. MONROE IRRIGATION COMPANY ET AL.

Supreme Court, Utah, November, 1898.

CONTROL OF IRRIGATING WATER — DITCHES — DAMAGE TO LAND.

—1. The law requires canal companies to use reasonable skill, judgment, and care in the construction of their ditches, and in their maintenance and repair, and imposes upon the proprietors of irrigated lands like skill, judgment, and care in the use and control of irrigating water. If such water flows upon the surface of irrigated lands onto the adjoining lands of another, to his injury, the person whose negligence causes or permits it must respond in damages. When the lower land becomes soaked, and too wet from infiltration and percolation, from irrigated land, and is thereby injured and damaged, the upper proprietor cannot be held liable, when he irrigates his land with reasonable care, and uses no more water than is reasonably necessary in so doing.

2. Canal companies and others should conduct their surplus waters in suitable ditches to the source of supply, when practicable, and should control and dispose of such waters so that they will not injure the property of other persons. A canal company whose surplus ditch is inadequate and is improperly maintained is liable in damages to one who is injured by the water escaping from said ditch.

3. Canal companies and others attempting to control and use water are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature. They are not required to meet unlooked for and overwhelming displays of power, — such as storms of such unusual violence as to surprise cautious and reasonable men.

4. Where the court sitting as chancellor makes findings, on which judgment is entered, contrary to the weight of the evidence, the judgment will be set aside.

5. Where counsel for plaintiff offered to prove certain facts, and the court required that the witnesses be sworn and put upon the stand so that the admission of questions and answers might be ruled upon, which counsel for plaintiff refused to do, *held*, that such offers were properly rejected.

6. The court should preside with dignity and propriety, and has the right to reprove or rebuke counsel for language and conduct tending to bring it into contempt, and, in proper cases, to punish by fine or by imprisonment. Counsel should be respectful, and has rights which the court should at all times respect. The court regarded the language and manner of plaintiff's counsel as contemptuous, and used language towards counsel in the presence of the jury which he regards as prejudicial. *Held*, that, in view of the record, the language of the court was not prejudicial error.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Sixth District, in favor of defendant.

The plaintiff alleged in his complaint he was the owner of fifty-six acres of land situated below defendant's canals and lands irrigated from them; that they owned and controlled a certain ditch through which they carried surplus and waste water from off lands irrigated by them to the Sevier river, the source of supply; that such ditch extended through plaintiff's land, and had been improperly constructed, and was negligently maintained; that, in consequence of such defective construction and want of repair, the drainage from the higher land irrigated from defendant's canals was collected, and caused to flood a portion of plaintiff's land, washing it away, and rendering it unproductive. In his complaint, the plaintiff also declared upon another cause of action similar to the one above set forth, and concluded with a prayer for judgment for \$575, and for a writ of injunction restraining the defendants from so maintaining their surplus ditch as to injure his property. The defendants answered, denying the improper construction of the ditch, negligence in maintaining it, or that they caused plaintiff's land, or any part of it, to overflow, or that any water escaped from their surplus ditch onto it, to plaintiff's injury.

The points decided are stated in the syllabus.

Judgment reversed and a new trial granted. Costs of appeal awarded to plaintiff.

Opinion by ZANE, Ch. J.

ISHAM V. DOW'S ESTATE.

Supreme Court, Vermont, August, 1898.

DOG WOUNDED BY DEFENDANT AND RUNNING AGAINST PLAINTIFF, WHO WAS INJURED THEREBY — PROXIMATE CAUSE. — Where the defendant, knowing that he was a poor shot and having impaired eyesight, unlawfully and maliciously shot at and wounded the plaintiff's dog, that was lying peaceably in close proximity to the plaintiff's house on the land of a third person, whereupon the dog sprang up and rushed wildly into plaintiff's house and ran against plaintiff, and knocked her down and injured her, the defendant was liable, as his act was the proximate cause of the injury without any intervening agency, and it was immaterial whether the injury was or could have been foreseen or not (1).

1. For actions relating to injuries sustained from attacks by DOGS, and other ANIMALS, see 1 AM. NEG. CAS. 1-436, where the same are classified according to States and chronologically arranged from the earliest period to 1895. The subsequent cases to date appear in vols. 1-5, AM. NEG. REP., and the current numbers of that series of Reports.

EXCEPTIONS from Chittenden County Court. From a ruling of the court directing a verdict for defendant, plaintiff brings exceptions.

SENECA HAZELTON and J. E. CUSHMAN, for plaintiff.

W. L. BURNAP and HENRY BALLARD, for defendant.

ROWELL, J. — Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, knowing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly and maliciously shot at and wounded her husband's dog, lying peaceably in close proximity to the house, on the land of a third person, whereupon the dog sprang up and rushed wildly and rapidly towards the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, knocking her down and injuring her; and the question is whether the estate is liable for it. The defendant says that, in order to recover, the plaintiff must establish two things, namely, negligence on the part of Dow, and that her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of her injury. But we cannot adopt this view. The intestate unlawfully, wantonly and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not; and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen, or not, or was or not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events. This is the universal rule when the injurious act is wanton. In 16 Am. & Eng. Enc. Law, 434, the true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is quasi criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended. But it is not necessary, in this State, certainly, that the act should be wanton, in order to impose liability for all the injurious consequences. If it is voluntary, and not obligatory, it is enough. In *Vincent v. Stinehour*, 7 Vt. 66, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In *Wright v. Clark*, 50 Vt. 130, the

defendant shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog; and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not intend to hit him. The same rule was applied at *nisi prius*, without exception, in *Taylor v. Hayes*, 63 Vt. 475, 21 Atl. Rep. 610, where the defendant shot at a partridge, and accidentally hit a cow. So, in *Bradley v. Andrews*, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd, and hurt the plaintiff; and it was held that as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him. The rule is the same here in negligent cases, and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule, care must be taken to distinguish between what is negligence, and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but, when negligence is once established that consideration is entirely immaterial on the question of how far that negligence imposes liability. This is all well shown by *Stevens v. Dudley*, 56 Vt. 158, and *Gilson v. Canal Co.*, 65 Vt. 213, 26 Atl. Rep. 70. The rule is the same in England, as will be seen by referring to the leading case of *Smith v. Railway Co.*, L. R. 6 C. P. 14, in the exchequer chamber (1). In *Sneesby v. Railway Co.*, 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of the defendant's railway on a level, and when the

1. The facts in *Smith v. London and South Western R'y Co.*, 6 L. R. C. P. 14, affirming 5 L. R. C. P. 98, were as follows: Workmen employed by a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and

was thence carried by a high wind across the stubble field and over a road, and burnt a cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the railway company had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heap of trimmings, and not on the parched ground around them.

cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding among them, which separated them from the drovers, and so frightened them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, or into the garden through a defective fence, and thence on to another track of the defendant's railway, and were killed; and the question was whether their death was not too remote from the negligence to impose liability. The court said: That the result of the negligence was twofold: First, that the trucks separated the cattle; and, second, that the cattle were frightened, and became infuriated, and were driven to act as they would not have done in their natural state. That everything that occurred or was done after that must be taken to have occurred or been done continuously. And that it was no answer to say that the fence was imperfect, for the question would have been the same, had there been no fence there. Their liability was made to depend, not on the nearness of the wrongful act, but on the want of power to divert or avert its consequences, and it continued until the first impulse spent itself in the death of the cattle. See *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Railroad Co. v. Chapman*, 80 Ala. 615, 2 Southern Rep. 738. *Ellis v. Cleveland*, 55 Vt. 358, is not in conflict with the Vermont cases above cited, as is supposed; for there there was no causal connection between the wrongful act and the injury complained of, and so there could be no recovery. As illustrative of nonliability for damage flowing from an intermediate and independent cause operating between the wrongful act and the injury, see *Holmes v. Fuller*, 68 Vt. 207, 34 Atl. Rep. 699. *Ryan v. Railroad Co.*, 35 N. Y. 210, is relied on by the defendant. *Railroad Co. v. Kerr*, 62 Pa. St. 353, is a similar case. It is said in *Railroad Co. v. Kellogg*, 94 U. S. 474, that these cases have been much criticised; that if they were intended to hold that when a building has been negligently set on fire, and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the States where they were made, and are in conflict with numerous cases in

Held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence that the fire originated in sparks from the engine that had just passed. *Held*, secondly, that there was evidence that the company was negligent in leaving the dry trimmings, and that the

trimmings either originated or increased the fire, and caused it to spread to the stubble field. *Held*, thirdly, that if the company was negligent, it was responsible for the injury that resulted to the owner of the cottage, although they could not have reasonably anticipated such injury.

other jurisdictions. Judge Redfield says in 13 Am. Law Reg. (N. S.) 16, that these cases have not been countenanced by the decisions in other States. And Judge Cooley says that a different view prevails in England and most of the American States; that the negligent fire is regarded as a unity; that it reaches the last building, as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first, though, if it had been stopped on the way, and started again by another person, a new cause would thus have intervened, back of which any subsequent injury could not be traced; that proximity of cause has no necessary connection with contiguity of space nor nearness of time. Cooley, Torts (1st ed.), 76.

Judgment reversed and cause remanded.

DOUGLAS v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court, Wisconsin, September, 1898.

INJURED BY TRAIN AT STREET CROSSING—GOING UPON TRACK AFTER GATES WERE DOWN. — Where the plaintiff approaching a street upon which there were railroad tracks found the gates down and went upon the tracks, and was injured by a passing train, he could not recover therefor though he looked both ways and listened for trains, and the train that struck him was backing up without lights or a man on the rear end, and it appeared that persons were accustomed to cross there when the gates were down.

APPEAL from judgment, Superior Court, Milwaukee County, in favor of defendant on a nonsuit.

Action to recover for personal injuries alleged to have been caused by defendant's actionable negligence. The evidence tended to prove that at a Becker street crossing of the defendant's railway right of way in the city of Milwaukee, defendant maintained six railway tracks with a gate on each side of the right of way, so operated that when the crossing was about to be used for the passage of trains the gates were let down so as to bar the approach to the track for the entire width of the street; that plaintiff was familiar with the crossing and the purpose for which the gates were used; that pedestrians were accustomed, notwithstanding the operation of the gates, to enter upon the right of way and cross it as in their judgment circumstances would permit; that on a dark night between

the hours of nine and ten, plaintiff approached the crossing by way of the street from the east; that as he arrived at the gate it was let down, but he nevertheless passed around it and proceeded to cross the right of way; that he looked both ways and listened for an approaching train, and observing one coming from the north, about 500 feet away, concluded he could safely proceed, and did so; that he passed over the track on which the train was coming, and when he reached the westerly track was struck and injured by a train that was backing up without any light or man on the rear end to signal its approach. He testified that he continued to look both ways for approaching trains after he passed the one which he observed 500 feet away. Defendant's counsel moved the court for a nonsuit, which was granted, and from the judgment thereupon entered plaintiff appealed.

JOHN J. McDONNELL and W. J. TURNER, for appellant.

C. H. VAN ALSTINE, for respondent.

MARSHALL, J. (after stating the facts). — Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or to the reasonable inferences which a jury may rightfully draw therefrom, the ultimate fact as to whether the party charged with negligence is guilty is for the jury; but where the facts are undisputed and the inferences therefrom all one way, the controversy turns on a question of law and must be decided by the court. Testing this case by that familiar rule, the trial court nonsuited the plaintiff. Whether contributory negligence on the part of the plaintiff was conclusively established so as to raise but a question of law is the sole question on this appeal.

Some things in the law of negligence are settled and so firmly established by judicial authority as to be binding on the courts as rules of unwritten law, and among those things is, that if a person enters upon a railway track after receiving timely warning that it is about to be used for the passage of trains, he does so at his peril, and if a personal injury results by his being struck by a train, such result is attributable to his contributory negligence, and neither he nor his personal representatives can recover therefor. There are some exceptions to this rule growing out of special circumstances in particular cases, but the facts of this case bring it clearly within the rule. At a railway crossing of a public street in a populous city, especially where there are several side and spur tracks, as well as main tracks, in frequent use by night and day, the maintenance of crossing gates is one of the most common and most effectual methods of guarding the personal safety, not only of travelers on the street, but of the employees of the railway company as well. Where

gates are so maintained it is the duty of travelers, on approaching the right of way and observing that the gates are down or about to be let down, to stop till they are raised before proceeding. The presence of a gate across the approach to the railway tracks says to the traveler, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains. The track itself is a general notice of danger, calling upon the traveler to look and listen for approaching trains, but the presence of the gate across the highway is more. It is a specific notice that the danger of going upon the right of way is immediate, and that no person of ordinary care should assume it without expecting to take all risks upon himself of what may result so far as relates to his personal safety. It is no excuse for disregarding such a warning that persons are accustomed to cross at that place when the crossing gates are down. True, what persons customarily do under similar circumstances is usually the test of ordinary care, but to that is the familiar exception that where the doing of an act is so obviously dangerous as to constitute negligence as a matter of law, as going upon railway tracks, or walking upon the tracks, without looking or listening, or for persons, not employees of a railway company, to jump on and off from moving cars, or the doing of any other of the many things that might be mentioned, that are dangerous in themselves. *Flynn v. Railway Co.*, 83 Wis. 238, 53 N. W. Rep. 494; *Glover v. Scotten*, 82 Mich. 369, 46 N. W. Rep. 936; *Warden v. Railroad Co.*, 94 Ala. 277, 10 Southern Rep. 276; *George v. Railroad Co. (Ala.)*, 19 Southern Rep. 784; *Wherry v. Railway Co.*, 64 Minn. 415, 67 N. W. Rep. 223.

The adjudicated cases on the questions raised here are substantially all one way and on the line indicated. *Cleary v. Railroad Co.*, 140 Pa. St. 19, 21 Atl. Rep. 242, is directly in point. There plaintiff entered within the limits of the crossing, disregarding the gates, and while looking at one train with a view of avoiding it, was struck by another. Her view of the train that did the injury was interfered with by the one she had in mind to avoid. There was no bell rung or whistle sounded, nor any brakeman or flagman on the car that did the mischief to warn persons upon the crossing of its approach. In deciding the case the court said, in effect: Crossing gates are a warning to all persons approaching the tracks, whether traveling on foot or otherwise, the only difference being that though a vehicle cannot pass them a footman may if sufficiently foolhardy to attempt it and if successful in escaping the danger. The gates are a warning, not for a particular train, but for all trains that may be about to pass or be passing while they are down. To the same effect are *Sheehan v. Railroad Co.*, 166 Pa. St. 354, 31 Atl. Rep. 120; *Peck v.*

Railroad Co., 50 Conn. 379; Granger v. Railroad Co., 146 Mass. 276, 15 N. E. Rep. 619; Duvall v. Railroad Co., 105 Mich. 386, 63 N. W. Rep. 437; and Railroad Co. v. Colvin, 118 Pa. St. 230, 12 Atl. Rep. 337. In Sheehan v. Railroad Co., *supra*, the court said, in substance, that if a person goes upon a railway track regardless of the warning to him by the presence of the gates across the approach, and is injured by placing himself in the pathway of an approaching train, without wanton negligence on the part of the railway company's servants, he cannot recover whatever he may say about looking and listening. Though the court treated the failure to observe the approaching train as a distinct act of negligence, precluding a recovery, the act being on the right of way at all, under the circumstances, was also deemed fatal, Cleary v. Railroad Co., *supra*, being cited as controlling, and the effect of the opinion and decision given as stated. In Granger v. Railroad Co., *supra*, the circumstances were that it was dark and misty, so that the lights had already been set for the night; that there were four tracks, and crossing gates let down so as to bar the approach thereto for the entire width of the street, including the sidewalks; that a train had entered upon the crossing on the first track and another was approaching on the third track and only a short distance away. The person injured, disregarding the warning by the gates being down, passed under or around them and successfully avoided the first train, but was struck by the second about seventeen feet further on and killed. The court below sent the case to the jury with the result that there was a verdict and judgment for plaintiff. On appeal the judgment was reversed, the court saying that the presence of the gates sufficiently warned the intestate that it was dangerous to cross the tracks, not that the gates were down for the first train only, which was in plain view, but for any train that might be about to pass the crossing; that the scope of the warning was that the defendant required for the present the exclusive use of the entire crossing for its business, and it was negligent for the deceased to pass the gates and go upon the crossing at all under the circumstances. Perhaps a still stronger case than any before cited is Debbins v. Railroad Co., 154 Mass. 402, 28 N. E. Rep. 274. There a person went upon the railway tracks regardless of the crossing gates being down, in order to board a train that was standing on one of the tracks. There was another train approaching and in dangerous proximity, but obscured from view by the first train mentioned. It was dark and there was no headlight or other means of warning of the approach of the moving train, other than the position of the gates and the noise. Plaintiff was struck by the latter train and severely injured. The court held

that he was guilty of gross negligence; that if he had been a mere traveler and undertaken to cross the tracks while the gates were down, knowing that fact, he would have taken the risk and could not have recovered for any injury received from a passing train; that if the fact that he desired to board the train excused him from passing the gates at all under the circumstances, he was yet bound, as he proceeded, to use all the caution which the nature of the case would permit, and that such precaution required more than to glance in the direction of the approaching train (1).

The reasoning of the cases to which special attention has been called, and of others cited, applies to the facts of this case, and meets with unqualified approval. They are in accordance with well settled principles in the law of negligence and must control here in favor of an affirmance of the judgment appealed from.

Judgment affirmed.

1. As to other actions for damages for injuries sustained at RAILROAD AND STREET CROSSINGS, see the cases reported in this volume on pages 1, 92 and 110, and note of recent cases thereon, pp. 1-3, *ante*, and the current numbers of Vol. 5 AM. NEG. REP.

For actions on the same topics, decided in 1897 and 1898, see Vols. 1-4,

AM. NEG. REP. The citations of the cases can be readily found by a reference to the TABLE OF CASES CLASSIFIED which precedes the INDEX in each of the volumes of the series of AMERICAN NEGLIGENCE REPORTS where the same are classified under the heading of CROSSINGS.

CLARE V. SACRAMENTO ELECTRIC POWER AND LIGHT COMPANY.

Supreme Court, California, December, 1898.

VERDICT — SUBSTANTIAL DAMAGES AWARDED THOUGH NO PECUNIARY LOSS SHOWN. — The grant of substantial damages is warranted when the evidence shows that plaintiff's hearing in one ear had been permanently destroyed, that the sight of one eye had been seriously impaired and that his nervous system had received a shock from which he might never recover and which was such at the time of the trial as to impair his facility for transacting his former business, though his wages were not cut off or diminished by the injury and he had not been subjected to any pecuniary outlay or loss.

DEPARTMENT I. Appeal from judgment of Superior Court, Sacramento County, in favor of plaintiff.

L. T. HATFIELD, for appellant.

A. L. HART, for respondent.

HARRISON, J. — The plaintiff brought this action to recover damages for an injury alleged to have been sustained by him by reason of coming in contact with a wire used by the defendant to sustain one of the poles by which its trolley wire is supported, and which had been so negligently placed that, when the plaintiff came in contact with the wire, he received a current of electricity with which it had become charged, and was thereby permanently injured. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff for the sum of \$2,000.

The fact, as well as the extent of the plaintiff's injury, and whether it was caused by reason of the electric current, as well as whether the wire became charged with the electricity through the negligence of the defendant, were the issues which were submitted to the jury, and upon which evidence was introduced by each party. The evidence on the part of the plaintiff tended to support his allegations upon these issues, with which the evidence on the part of the defendant merely created a conflict, and the verdict of the jury thereon must be accepted as conclusive.

The jury were instructed that the plaintiff was not entitled to exemplary damages, but only such as would reasonably compensate him for the injuries which he had received; and it is urged by the plaintiff that, inasmuch as there was no evidence before the jury tending to show the amount of pecuniary injury which he had sustained, the amount of the verdict is not sustained by the evidence;

that as he did not show that his earning capacity had been diminished by reason of the injury, or that he had been subjected to any pecuniary outlay or detriment, the jury should have given a verdict for only nominal damages. The evidence before the jury was such as to authorize them to find that the hearing in his left ear had been permanently destroyed; that the sight of his left eye had been seriously impaired; and that his nervous system had received a shock from which he might never recover, and which was such at the time of the trial as to impair his facility for transacting the business in which he had been engaged prior to the injury. In view of this evidence, it cannot be said that the jury disregarded the instructions of the court, or that the verdict is not sustained by the evidence. There is no standard by which the value of an eye or of an ear or of a limb can be computed, or which will determine the amount of money which will compensate a person for the loss or impairment of one of his senses. The right to compensation for a personal injury is not dependent upon the fact that the wages of the injured person were cut off or diminished by reason of the injury, nor is the amount of compensation for such injury to be measured by the amount of his income or wages. In cases of this character there can be no direct evidence of the amount of damage sustained, or the amount of money which will be a compensation for the injury; but it is sufficient to show to the jury the extent of the injury, and the amount of their verdict thereon is to be determined in the exercise of an intelligent discretion; and, unless the amount of the verdict is such as to indicate that it was given under passion or prejudice, it will be sustained. In view of the evidence in support of the injury to the plaintiff, the verdict in the present case cannot be regarded as excessive. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266; *Morgan v. Railway Co.*, 95 Cal. 501, 30 Pac. Rep. 601; *Sloane v. Railroad Co.*, 111 Cal. 668, 44 Pac. Rep. 320.

Various exceptions were taken by the defendant to the rulings of the court upon the admission of evidence, and we have carefully examined the record and the exceptions so taken, but find therein nothing deserving of extended consideration, or which would justify a reversal of the judgment.

The record also contains certain instructions given to the jury by the court, but does not show that any exception was taken thereto, except to those given at the request of plaintiff, and in these we find no error.

The appellant has filed certain affidavits to the effect that other instructions of the court were excepted to on its behalf, and has asked that the statement on motion for a new trial be amended so

as to show that fact. It is sufficient to say that the action of the trial court is to be reviewed here upon a transcript of the records of that court, and that we have no power to amend those records.

The judgment and order are affirmed.

GAROUTTE and VAN FLEET, JJ., concurred.

MCCURRIE v. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, December, 1898.

CAR DOOR SLAMMING UPON FINGERS OF PASSENGER. — Where a passenger while standing in the doorway of a car of a train which had stopped at a station was thrown off his balance by a sudden backward and forward jerk of the car, and to save himself from falling caught hold of the casing of the door, which slammed upon his fingers, the question of the company's negligence was for the jury.

PASSENGER NOT INTENDING TO ALIGHT, LEAVING SEAT. — Whether a passenger who went upon the platform of a car of a train that had stopped at a station, to see another person and not for the purpose of alighting, was thereby guilty of negligence was for the jury.

APPEAL from judgment of Superior Court, City and County of San Francisco, in favor of defendant.

F. J. CASTELHUN, for appellant.

W. H. L. BARNES, for respondent.

HARRISON, J. — Action to recover damages for personal injury alleged to have been sustained by reason of the negligence of the defendant. The appeal is from a judgment in favor of the defendant and from an order denying a new trial. The plaintiff testified that he purchased from the defendant a ticket to go from San Francisco to Tennant's station, in Santa Clara county, and that he boarded the train at Third and Townsend streets in San Francisco. He further testified: "When we arrived at Twenty-fifth and Valencia streets, the brakeman or conductor opened and fastened the front door of the car in which we were sitting in the usual way. I waited until I saw the door was fastened and the train stopped, and then got up to look for my son, who was waiting to see us. I went to the front to beckon to him, because the train does not stop long there. As I got to the platform, the train suddenly backed with a very great jerk, so violently that it threw me off my balance, and to save myself I caught hold of the casing of the door. Just then the door swung to and struck my hand, cutting three fingers very severely;" and on cross-examination he testified: "I left my seat after the train

stopped, and went to the front platform of the car, and stood partly in and out of the car, — just in the doorway. I won't be certain whether I stood on the platform or whether I was in the doorway, because the time was short. I called my son and he came up. The car gave a lurch backward, I think. I caught hold of the casing of the door to save myself from falling, and just then the door swung to and caught my hand. I went back to my seat, led by my son." His wife testified: "We boarded the train together at Third and Townsend streets. At the Valencia street station the car stopped, and my husband went out to the platform to beckon to our son to come into the car and see me. The train gave a violent jerk backwards and then forwards. I thought it would throw him to the ground. He put out his hand to take hold of the door casing, and then the door became unfastened and swung to and struck his hand. My son assisted him back to his seat. He was very faint." His son testified that he was waiting at the Valencia street station to see his father, and said: "When I got opposite the platform I saw him coming through the door. Just as I was about to step upon the platform the train went back with a sudden jerk, and then went ahead with a jerk. I had to look out for myself, for the train was moving a little. I saw he was falling. I tried to save him. He had thrown his hand up and caught hold. I did not see the door strike his hand, but I saw it as it swung back again. I led him back to his seat. The jerk was very violent, — a jerk sufficient to make him lose his balance." Testimony tending to show the extent of the injury was also given on behalf of the plaintiff, and at the close of his testimony the court, upon the motion of the defendant, instructed the jury to find a verdict in favor of the defendant, which was accordingly done.

When the negligence of the defendant is the basis of the plaintiff's right of recovery, it is the province of the judge to determine whether the evidence submitted by the plaintiff has any legal tendency to establish negligence, and it is for the jury to determine whether it is sufficient therefor. If there is no evidence from which a jury would have the right to infer negligence, the judge may withdraw the case from them; but, if the evidence is such that negligence may be inferred, he has not the right to withdraw the question from the jury upon the ground that, in his opinion, they ought not to make such a finding, and thus substitute his judgment for theirs upon a question of fact which the plaintiff has the right to have determined by a jury. If the evidence in a case would authorize a jury to find a verdict in favor of the plaintiff, the court is not at liberty to take the case from the jury, and substitute his own

determination of that question for that of the jury. The rule is the same whether the court is asked to grant a nonsuit or to direct a verdict in favor of the defendant. In either case the motion should be denied if there is any evidence from which the jury would be authorized to find a verdict in favor of the plaintiff.

The evidence on behalf of the plaintiff showed that the relation of passenger and carrier existed between him and the defendant at the time he received the injury, and there was also evidence tending to show that the injury was caused by the act of the defendant in the management and conduct of the train in which it had undertaken to carry him as a passenger. A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part. The case then falls within the rule given by Shearman and Redfield on Negligence (sec. 59): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." See, also, *Boyce v. Stage Co.*, 25 Cal. 460; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266; *Bush v. Barnett*, 96 Cal. 202, 31 Pac. Rep. 2; *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. Rep. 1020; *Madden v. Railroad Co.*, 50 Mo. App. 666, 4 Am. Neg. Cas. 424; *Dougherty v. Railroad Co.*, 81 Mo. 325, 4 Am. Neg. Cas. 532 (1); *Lavis v. Railroad Co.*, 54 Ill. App. 637; Whart. Neg., sec. 661; Cooley, Torts, *663. At the time the plaintiff received the injury, the train had stopped at one of its regular stations upon the road, and after it had stopped was moved backward with a sudden jerk, and then suddenly forward, by reason of which the plaintiff lost his balance, and was compelled to steady

1. For reports of decisions in *Dougherty v. Missouri R. R. Co.*, other than 81 Mo. 325, 4 Am. Neg. Cas. 532, see

9 Mo. App. 478, 4 Am. Neg. Cas. 329, and 97 Mo. 647, 4 Am. Neg. Cas. 597.

himself by taking hold of the casing of the door. The evidence tended to show that the injury to him resulted from the manner in which the train was moved by the defendant after it had stopped. If the case had been submitted to the jury upon this evidence, it would have been sufficient to authorize a verdict in his favor (*Bush v. Barnett, supra*), and the court erred in directing a verdict for the defendant. It would appear that the door swung to by reason of the jerking of the train, and, if so, the sufficiency or extent to which it was fastened back by the conductor was immaterial. It cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury.

The judgment and order are reversed.

BEATTY, Ch. J., GAROUTTE, TEMPLE, HENSHAW, and VAN FLEET, JJ., concurred.

McFARLAND, J., dissented.

LAKE ERIE AND WESTERN RAILROAD COMPANY v. MORRISSEY.

Supreme Court, Illinois, December, 1898.

MASTER AND SERVANT — DUTY OF RAILROAD COMPANY TO BALLAST TRACKS FOR SAFETY OF SWITCHMEN. — The duty of a railroad company towards its switchmen requires it to so ballast its tracks at all switching points that the ballast between the rails will be on a level with the top of the ties so that no opening will be left under the rails.

SYSTEM OF BALLASTING SAME AS OTHER ROADS — EMPLOYEE INJURED BY FOOT BEING CAUGHT UNDER RAIL. — The fact that the system of ballasting adopted by the defendant was the one adopted by other roads, and the method pursued was the same, did not relieve it from liability to an employee who, while coupling cars, caught his foot in an open space under the rail and was run over by the cars before he could extricate it.

RISK OF EMPLOYMENT. — The plaintiff did not assume the risk, though the defect was open and visible where it appeared it was his first trip over the road, and that he knew nothing about the condition of the track (1).

APPEAL from judgment of Appellate Court, Third District (75 Ill. App. 466), which affirmed a judgment for plaintiff.

1. In *QUINN v. CHICAGO, R. I. AND P. R'y Co.* (*Iowa, December, 1898*), 77 N. W. Rep. 464, it was held that where a brakeman had worked for a number of years around a certain switch which was dangerous because so constructed

as to be likely to catch the foot of one walking over it he was negligent in attempting to uncouple moving cars while passing over such switch and could not recover for an injury caused thereby.

TIPTON & TIPTON and JOHN B. COCKRUM, for appellant.

J. E. POLLOCK and FITZHENRY & POLLOCK, for appellee.

CRAIG, J. (after stating the facts). — Appellee, at the time of the injury, was thirty years of age, and was married. He had been rail-roading about twelve years, as brakeman, baggageman, and conductor. He had worked on the Chicago and Alton road about eleven years. He commenced work for appellant on the 6th of April, 1897, as conductor of a gravel train, and he afterwards had a run between Rankin and Peoria. East Lynn is a regular station for receiving passengers and freight on the division east of Rankin. The night of August 14, 1897, when the accident occurred, appellee was sent east as conductor, in charge of the appellant's freight train, on the Third, or Eastern, Division, and he had never made any trip prior to this one over this Eastern Division. He started from Tipton, Ind., with a train of forty-three or forty-four cars; and when the train reached East Lynn, about 100 miles west from Tipton, it was about 1:30 o'clock at night. It was necessary to do some switching at this station, by putting off some cars. Two cars were shoved on the north, or "business," track, as it was called. Then they pushed two more on the main track, and shoved a couple more on the business track. Under the rules of the road, it was appellee's duty to couple and uncouple cars. Four cars were cut off and run down on the main track, and appellee set the brakes on them, when he noticed the other cars coming down the main track, pushed by the engine; and he went over and set the coupling pin on the two cars then standing on the main track. It appears that the two Empire Line cars he was attempting to couple have a deck on the end, and on this are iron buffers. The drawbar is below, and they are more difficult to couple than ordinary cars, and require the entire attention of the person making the coupling. When appellee undertook to make the coupling, he had hold of the handhold with his right hand, and reached down and placed the link in the drawbar. He then raised up and reached over to shove the pin down when the cars came together. The cars pushed the two cars that had been standing about half a car length, and appellee was compelled to walk along with them, and it was while going that distance that he was injured. He made two or three steps, and the cars parted, and, when they parted, he tried to step out from the track. He stepped out with his right foot, but his left foot caught, the toe of his shoe going under the north rail of appellant's track; and he was unable to extricate it, and was thrown down by the cars he was attempting to couple, and fell upon the north rail of the main track, and his left leg was run over, and was so injured that it was necessary to

amputate it. It appears that it was appellee's first trip through East Lynn in charge of a train, and he knew nothing about the condition of the track, except what he might have learned in the short time he stood there coupling the cars.

One of the grounds urged by appellant for reversal is that the court, at the close of the evidence and before the argument of counsel, refused to instruct the jury to find the issues for the defendant. Where there is evidence fairly tending to sustain the issues in behalf of the plaintiff, the weight to be given to the evidence must be submitted to the jury, and it is the duty of the court to refuse an instruction like the one asked. An examination of the evidence as to whether there was evidence tending to support the cause of action as set out in plaintiff's declaration satisfies us that the trial court did not err in refusing to take the case from the jury. Did the court err in giving instructions on the part of appellee? Only four instructions were asked or given on the part of appellee, while thirty-six were given on the part of appellant. Appellant argues that it is not liable if its road was ballasted as roadbeds are usually ballasted which have adopted the system appellant adopted. The question made by the declaration was not whether the "crown" or "box" system of ballasting a railroad was the best, but whether, under the declaration, the appellant "carelessly and negligently permitted its main track in the vicinity of the switch and side track to remain out of repair and in unsafe condition, and carelessly permitted certain ties to remain above the surface of the ground, and carelessly and negligently permitted the north track to remain above ground, and failed to have the ground between the ties and the bottom of the rail filled up so that plaintiff would not be exposed to danger of accident in attending to his duties as such conductor while in and about coupling and uncoupling cars passing upon and over said track," etc. The third instruction for the plaintiff told the jury that it was the duty of the defendant to have its track ballasted at the village of East Lynn, within switching limits, with cinders, gravel, or other substance up level with the ties, and level with the bottom of the rail, if ballasting to that extent was necessary to make such railroad track reasonably safe to employees in coupling cars; and that if they believed, from the evidence, that the track was not so ballasted at the point of the alleged injury, but, on the contrary, was ballasted so that the gravel was lower than the rail at said point, and that, by reason of such gravel being lower than the rail, the plaintiff, while exercising ordinary care for his own safety, caught his foot underneath the rail, and was unable to extricate the same, and in consequence thereof was injured, then in such

case they should find for the plaintiff, and assess his damages at what they believed, from the evidence, he had sustained.

In *Railroad Co. v. Sanders*, 166 Ill. 270, 46 N. E. Rep. 799, 2 Am. Neg. Rep. 106, which was a case involving the same principle in effect, this court said (page 278, 166 Ill., page 802, 46 N. E. Rep., and page 109, 2 Am. Neg. Rep.): "The law does not require a railroad company to furnish machinery, tracks, and switches for their employees which are of the best character or that are absolutely safe; but the duty imposed is to use reasonable and ordinary care and diligence in providing safe machinery, tracks, and switches for the use of those engaged in its service. *Railroad Co. v. Loneragan*, 118 Ill. 41, 7 N. E. Rep. 55. But this rule, as the evidence tends to show, was not observed. The evidence seems to show that, as a general rule, railroad companies at stations within switching limits have their tracks filled up to the level of the ties, so that brakemen may walk over the ties in coupling cars without stumbling or falling. If this precaution had been observed, it is apparent appellee's foot, in attempting to couple the cars in question, would not have been caught under the ties, and he would not have stepped into the cattle guard, and received the injury." What was said in the *Sanders Case* is applicable here. The evidence in this case shows that many of the railroads, — the Chicago and Alton, the Chicago and Northwestern, the Chicago, Burlington and Quincy, and several other roads, — on the main track, in the switch yards, and at terminals, grade up their tracks even with the top of the ties to make them safe for brakemen coupling and uncoupling cars. The law requires a railroad company to exercise reasonable and ordinary care and diligence in furnishing safe tracks for its employees. If it is necessary for the safety of its employees in the larger towns and terminals, it is equally necessary in the smaller places where switching is necessary to be done. Moreover, the principle announced in appellee's third instruction is recognized in appellant's seventeenth instruction, which reads as follows: "The court instructs the jury that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance to and on a level with the bottom of the rail, unless the same is necessary to make the same reasonably safe. If the jury believe, from the evidence, that the roadbed and track at the point in question was reasonably safe for the employees in the management of defendant's trains, the jury will find the defendant not guilty." This instruction, while it asserts that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance, to and on a

level with the bottom of the rail, admits it is required if necessary to make the same reasonably safe, which is in harmony with appellee's third instruction. The law required the railroad company to furnish a reasonably safe track inside the switching limits, where switching was required to be done; and the plaintiff, in the absence of knowledge to the contrary, as we said in the Sanders Case, *supra*, had the right to presume that the railroad company had discharged its duty in this regard. The evidence shows that the plaintiff was not familiar with the road at the place where the injury occurred, having never been over this Eastern Division prior to this trip, and that he did not know anything about the condition of the track before that; that it was in the nighttime, and he was not standing there more than a minute before the cars were pushed by the engine to be coupled. These instructions, both on the part of appellant and appellee, are in substance to the same effect, and agree as to the law, and are in accord with the views of this court as expressed in Railroad Co. v. Sanders, *supra*, and therefore could not have misled the jury to the prejudice of appellant. Railroad Co. v. Hines, 132 Ill. 161, 23 N. E. Rep. 1021.

Appellant insists the court erred in modifying appellant's twenty-sixth instruction, by inserting the words "and known to plaintiff." The instruction is as follows: "The court instructs the jury that if they believe, from the evidence, that the plaintiff was an employee of the defendant, and, as such, was conductor of and in charge of the train in question, and if you further believe, from the evidence, the defendant's roadbed and track at the point in question, as constructed, was reasonably safe for its employees engaged in the movement of the defendant's trains and the operation of its road, and that the condition of the road at the place of injury was open and visible and known to plaintiff, then the law is that the plaintiff assumed the ordinary risks incident to such employment, and that the injury incident to the coupling of cars was one of the risks assumed by the plaintiff under that employment, and for which he cannot recover." The modification was proper, under the evidence in the case. Appellee testified this was his first trip over this division; that he knew nothing about the condition of the track where the injury occurred; that it was in the nighttime, and he had no opportunity to see it except the moment he was attempting to couple the cars; and there is nothing in the record contradicting appellee. In Railroad Co. v. Hines, *supra*, this court said (page 169, 132 Ill., and page 1022, 23 N. E. Rep.): "The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and, while the master is not to be held liable for defects

and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. *Shear. & R. Neg.* (2d ed.), sec. 95; *Bish. Noncont. Law*, sec. 678; *Porter v. Railroad Co.*, 60 Mo. 100. And, necessarily, much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where, as in the present instance, the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switch bars, etc., over which he may, from time to time, have to pass."

Appellant objects to the modification of its thirtieth and thirty-first instructions. They are as follows: 30. "The court instructs the jury that if they believe, from the evidence, that it is customary for well-managed railroad companies to ballast their tracks with gravel, making a crown in the center, sloping off each way towards the rails, leaving an inch or an inch and a half of space under the rails for water to escape, and that such method of ballasting is reasonably safe for employees, and if the jury believe, from the evidence, that the defendant's road at the point in question was so ballasted, then the jury will find the defendant not guilty." 31. "The court instructs the jury that if they believe, from the evidence, that the defendant's road was ballasted with gravel at the point in question, crowned in the middle, sloping to the tracks, leaving an inch or an inch and a half of space under the rails for the water to escape and that this mode of ballasting is in common use by well-managed railroads in this country, and that such ballasting is reasonably safe for employees, then the defendant is not liable." Under the allegation in the declaration, as before shown, the modification, "and that such method of ballasting is reasonably safe for employees," was proper, and not error. The modification of appellant's sixth, sixteenth, twentieth, twenty-first, twenty-third, and twenty-fourth instructions was proper for the same reason, and it is unnecessary to refer to each one separately. The instructions, taken together as a series, fully presented the law as applicable to the case under the pleadings; and, perceiving no serious error, the judgment of the appellate court will be affirmed.

Judgment affirmed.

INDIANA PIPE-LINE AND REFINING COMPANY v. NEUSBAUM.

Appellate Court, Indiana, January, 1899.

MASTER AND SERVANT — DANGEROUS PREMISES. — Where it appeared that the defendant employed about fifty men and fed and lodged them in a tent in a field on its premises, and that the plaintiff, one of the employees, came to the tent along a public road and then by a private way to the tent for his evening meal, and after it was over was told by defendant's representative to go to a neighboring town to find a bed, and the plaintiff took a direct route across the field, and it being dark, fell into an unprotected well dug in the field by the defendant, of which the plaintiff was unaware, though there was earth from the well spread around it for a distance of twelve feet, the defendant was liable without proof that it had directed the employee to take that route, or that it knew he had taken it.

APPEAL from judgment, Circuit Court, Wells County, in favor of plaintiff.

DAILEY, SIMMONS and DAILEY, for appellant.

MOCK & SONS, for appellee.

COMSTOCK, J. — The issues in this cause on which the trial was had were formed on the second paragraph of complaint and the answer in general denial thereto. The jury returned a general verdict in favor of appellee, assessing his damages at \$363, and with the general verdict returned answers to interrogatories. The court rendered judgment in favor of appellee for the amount named in the verdict.

The specifications of the assignment of errors discussed are those numbered 1, 2, 3, 4, and 5. The first and second question the sufficiency of the second paragraph of complaint. The third and fourth challenge the action of the court in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. The fifth, the action of the court in overruling appellant's motion for a new trial. The second paragraph of complaint avers that the defendant is a corporation engaged in putting up a telegraph line from Domestic, Ind., to a point near Momence, Ill., and for that purpose employed defendant and some fifty other men, and boarded and lodged said employees in a tent; that the tent was pitched at many places along said line, and near many towns; that on said 28th day of October, 1896, the defendant pitched said tent on its own premises, within one-fourth mile of, and east of, the town of Ora, in Stark county, Ind.; that on said day said

employees worked southeast of said place where said tent was pitched, and did not reach said tent until dark; that plaintiff had never been on said premises before said time, and had never been in the said town of Ora; that there was no road, path, or traveled way from said tent to said town of Ora, but said tent was placed in the field of the defendant; that on said day defendant dug a hole in said field fifteen feet wide and fifteen feet deep, between the said tent and said town of Ora, and negligently, carelessly, and wrongfully left the same uncovered, without light, and wholly unguarded, well knowing that said employees would visit said town of Ora on said night, and pass over said field in going to said town, and were liable to fall into said hole and become injured; that said night was very dark, and said hole could not be seen without light; that on said night there was no lodging room in said tent for plaintiff, and defendant prepared lodging for plaintiff on said night at said town of Ora; that on said night, after the plaintiff had taken supper in said tent, he was directed by defendant to go to said town of Ora for lodging, and, while it was very dark, as aforesaid, plaintiff started across said field on the direct route to said town of Ora, and without any negligence or fault of plaintiff, but owing to the negligence of the defendant in leaving said hole uncovered, without light or guards, the plaintiff fell into said hole on his head and shoulders, thereby wrenching his back, shoulders, and arms, and breaking his fingers, and bruising his face, hands, and body, and permanently injuring his hands and fingers; that plaintiff received said injuries without any fault, carelessness, or negligence on his part, and he had no knowledge whatever of the existence of said hole or its dangerous condition, before he fell into the same; that, by reason of said wrongs and injuries aforesaid, plaintiff has been, and is, damaged in the sum of \$5,000. Wherefore, etc.

Appellant's counsel point out as defects in the foregoing paragraph that it does not allege that appellant directed appellee to take the route he took when he started for Ora, or that appellant knew he had gone or intended to go in the direction taken; the only averment connecting appellant with the trip to Ora being in this language: "He was directed by defendant to go to said town of Ora for lodging." Appellant's learned counsel insist that this allegation is not sufficient without the further averment that he was directed by appellant "to go to Ora across said field, and without any fault or negligence of plaintiff, but owing to the negligence of the defendant, and fell into said hole." By reference to this paragraph, it will be seen that it avers that the tent was pitched in the field of appellant; that there was no road, path, or traveled way from said tent to the

town of Ora; and that appellee started across said field in the direct route to said town of Ora. We think this averment makes the complaint sufficient to withstand a demurrer.

The third and fourth specifications of errors present the same question, — the action of the court in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict. It appears from answers to interrogatories that the well or hole into which appellee fell was located at a point about ninety-one feet north of the northwest corner of the tent mentioned in the complaint, and about 150 feet east of the west line of appellant's real estate; that there was a public highway on the north end of said tract, extending due west from the northwest corner thereof, a distance of 1,150 feet, to the town of Ora; that there was a private roadway belonging to appellant extending due south from the northwest corner of said appellant's land, along the west line thereof and beyond a point opposite said tent; that the northwest corner of the tent was about 475 feet south and 150 feet east of the northwest corner of said real estate. The surface of the ground was comparatively level immediately west of the tent to the driveway, as was the ground from the point where said well was located to a point seventy-five feet north thereof. The hole into which appellee fell was ten or twelve feet in depth and in diameter. It was dug on the day of the alleged injury by the servants of appellant, without the knowledge of appellee. The sand and dirt thrown out of said hole were cast upon the ground immediately around it, and extending from its side to twelve or fifteen feet. Appellant walked into the hole from the south side. When he came in contact with the dirt thrown out of said hole he did not stop to ascertain if there was any danger. There was no public or private roadway leading from the tent on appellant's premises to said hole at the time of the accident. Appellee could have passed out of the west door of the tent a distance of 150 feet to said private roadway of appellant, then north 475 feet to said public highway, and then west 1,150 feet to the town of Ora. There were no obstructions in the way of his so passing. At the time he fell into the hole appellee was looking at a light in a window on a hill eight feet higher than the ground around the tent, situate on the northwest corner of said real estate, near the public highway. Appellant had fifty-one men in its employ at that place engaged in the construction of the telegraph line, and two women engaged as cooks. On the night in question, ten men and the two women took lodging outside of the tent. There were sleeping accommodations in the tent said night for forty-eight persons. It is on the foregoing facts, found in answer to interrogatories, that

appellant asked for judgment notwithstanding the general verdict.

As has been said by the Supreme and this court, special findings in answer to interrogatories cannot override the general verdict unless they irreconcilably conflict with it. Special findings are not aided by any presumption, but all reasonable presumptions are indulged to sustain the general verdict. As said in *City of Fort Wayne v. Patterson*, 3 Ind. App. 36, 29 N. E. Rep. 167: "In determining whether there is such a conflict, the evidence actually introduced will not be examined; and if, taking all the special findings together and adding to them any other facts that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answer to interrogatories will not be allowed to control." See, also, *Cook v. Howe*, 77 Ind. 442; *Davis v. Reamer*, 105 Ind. 318, 4 N. E. Rep. 857; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *City of Huntington v. Burke* (Ind. App.), 52 N. E. Rep. 415; *Sponhaur v. Malloy*, Id. 245. The general verdict finds negligence on the part of appellant, and freedom from negligence on the part of appellee contributing to his injury. Under the acts of 1897 (Horner's Rev. Stat. 1897, sec. 546), under which act the verdict in this case was returned, a party is not required to prepare interrogatories to elicit all the facts pertinent to the issue. Under the issues, other facts might have been shown consistent with the general verdict, to wit: That appellee did not know of the safe private way on appellant's ground, or that he was directed by appellant's agent to take the route he selected, or was told that route was free from obstructions; that the night was dark; that the hole could not be seen; that he had no knowledge of its existence. With such additional facts found, an irreconcilable conflict between the facts found and the general verdict might have been avoided. Appellant's motion for judgment was properly overruled.

The fifth and last specification of the assignment of errors is the overruling of appellant's motion for a new trial. Two of the grounds stated and discussed in said motion are that the verdict of the jury is not sustained by sufficient evidence; that the verdict is contrary to the evidence. The evidence is in the record. It appears from the evidence that appellee came from Ora to the tent the evening of the accident, coming east from Ora along the public highway, to the northwest corner of appellant's ground; then south along its private way, to a point west of the tent; and then directly across appellant's land, to the tent. He reached the tent at six or seven o'clock, and found his supper ready, and ate it. An agent of appellant, having authority to arrange for the lodging of appellant's employees, then told him to go to Ora and find a bed. In a few

minutes thereafter he and one Montgomery (who did not testify) started directly north for Ora, and he walked right into the hole, from the south side thereof. He discovered before he got into the hole that there was a bank of dirt on which he was walking, but did not stop when his foot came in contact with it to investigate, but walked right on. If he had gone by the way he came from Ora, he would not have gone near the hole. The private way over appellant's land along which appellee traveled in coming to the tent was fenced. When he started to return to Ora, the evidence does not show that he attempted or intended to return by the same route by which he had come. The evidence shows that he was not directed to take any particular course. Appellee had no knowledge of the existence of the hole. The tent was pitched in a cornfield, the soil of which was sandy. The sand thrown out of the well was about as soft as that on the surface of the field. It was spread around the well a distance of twelve or fifteen feet. Its greatest height was three feet. It was hard walking in the sand. The well was right between the tent and a light in a house at the northwest corner of appellant's land, near the public highway leading to Ora. The appellee had seen the house as he was going to the tent. The light in the house, towards which he was walking and by which he was guiding his steps, was 309 feet from the well, and about eight feet higher than the surface of the ground at the tent. It could be seen from the tent. The grade was gradual. The way by which appellee came to the tent over the 150 feet of the field was that made by teams hauling in the tent and camp equipage. In our opinion, it was negligence for appellant to leave the well unguarded, which it had dug on its premises within ninety-one feet of a tent within the same inclosure, in which it lodged and fed fifty people, whether appellee, in attempting to go to Ora by the route he took and when he walked into the well, was proceeding with the caution of an ordinarily prudent person under like circumstances. Under the rule laid down in numerous approved decisions, viz., where there is room for difference of opinion as to the inferences which may be fairly drawn from the conceded facts, the question of negligence must be submitted to the jury. This was properly submitted to the jury, and answered in the general verdict in favor of appellee. *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. Rep. 714; *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. Rep. 1106; *Board v. Bonebrake*, 146 Ind. 311, 45 N. E. Rep. 470; *Railroad Co. v. Williams* (Ind. App.), 51 N. E. Rep. 128; *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. Rep. 480, 3 Am. Neg. Rep. 644; *Cooley, Torts* (12th ed.), p. 805; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Collarn*, 73 Ind. 261; *Railroad*

Co. v. Locke, 112 Ind. 404, 14 N. E. Rep. 391; Railroad Co. v. Crunk, 119 Ind. 542, 21 N. E. Rep. 31 (1).

Appellee was properly in the course of his employment when he received his injury. He had no knowledge of the dangerous place which had been left unguarded by his employer. It was so dark that it was not visible without a light. Ordinary caution required the appellant in some way to put upon their guard its employees, who lodged within a short distance, and were liable to walk into it if not informed of its existence. The same general direction had been followed by others going to Ora, but who fortunately, either through prior knowledge of the existence of the well or good fortune, kept out of it.

It is the duty of the master to keep his premises in a reasonably safe condition for those who are rightfully there. While the hole was dug by employees of appellee's employer, they were not engaged in the same kind of work and were not co-operating with him in the line in which he was engaged. The doctrine of the negligence of a co-employee does not apply. Appellant's learned counsel lay stress upon what they claim the fact to be, that appellant furnished a safe way to Ora, and that appellee was guilty of contributory negligence when he departed from it; but, as appears from the evidence, there was no way from the tent to the private way, except that made by the teams which had hauled the tent and equipage. In this connection we cite Railroad Co. v. Adams, 105 Ind. 152, 5 N. E. Rep. 187; Railroad Co. v. Wright, 115 Ind. 378, 16 N. E. Rep. 145, and 17 N. E. Rep. 584; Lumber Co. v. Ligas, (Ill. Sup.), 50 N. E. Rep. 225, 172 Ill. 315, 4 Am. Neg. Rep. 257; Coal Co. v. Greenwood (Ind. Sup.), 50 N. E. Rep. 36, 4 Am. Neg. Rep. 146; Lauter v. Duckworth (Ind. App.), 48 N. E. Rep. 864; Railroad Co. v. Amos (Ind. App.), 49 N. E. Rep. 854; Binford v. Johnston, 82 Ind. 426; Busw. Pers. Inj., p. 98; Railroad Co. v. Adair, 12 Ind. App. 584, 39 N. E. Rep. 672, and 40 N. E. Rep. 822; Railroad Co. v. Barnhart, 115 Ind. 399, 16 N. E. Rep. 121; Barman v. Spencer (Ind. Sup.), 49 N. E. Rep. 9; Hawkins v. Johnson, 105 Ind. 29, 4 N. E. Rep. 172; Coal Co. v. Shaw, 16 Ind. App. 9, 44 N. E. Rep. 676.

Appellant's learned counsel complain of the refusal of the court to give instructions numbered 2 and 6, respectively, as requested, and the modification, and giving as modified, of instructions 7, 10, and 11, set out as reasons in the motion for a new trial. Instruction No. 2 is a correct statement of the law, but is not applicable to the facts in the cause. It was drawn upon the theory that appellee was

1. Louisville & Nashville R. R. Co. v. Crunk, 119 Ind. 542, is reported in 3 Am. Neg. Cas. 229.

passing over appellant's land for his convenience and pleasure. The evidence does not warrant the assumption. He was in the employ of appellant, was to be fed and lodged, and was on his way to find lodging by a direct route at the time he received the injury, and was looking for lodging under the direction of appellant. There is some conflict in the evidence upon that point, but it was for the jury to reconcile such conflict. Instruction six was to the effect that if on the night in question appellee was not given any direction as to the way to take to Ora, and that if he did not return to the town of Ora over the route traveled by him when he came to said tent, but chose another way, with which he was not familiar, in which he fell into the well, mentioned in the complaint, he could not recover. This instruction would have taken from the jury the consideration of the question of contributory negligence as a fact — a question which was properly submitted to the jury. Instructions seven, ten, and eleven, requested by appellant, were open to the same objection. Given as modified, they correctly stated the law.

A careful examination of the whole record leads to the conclusion that the cause was fairly tried and a correct result reached.

Judgment affirmed.

McFARLAN CARRIAGE COMPANY v. POTTER.

Supreme Court, Indiana, December, 1898.

MASTER AND SERVANT — PROMISE TO REPAIR DEFECT — ASSUMPTION OF RISK. — Where the master agrees to repair or remedy a defect, the promise relieves the servant from the assumption of risk which the law raises against him from his continuance in the service with knowledge of the defect, but only for such length of time in which it might be reasonably expected the repairs would be made.

SAME. — Where the promise is to repair after the job on hand is completed, the agreement is not operative until that time arrives and the servant assumes the risk of injury by continuing at work.

APPEAL from judgment overruling the demurrer to complaint by Circuit Court, which the appellate court, upon appeal, transferred to the Supreme Court.

MILLER & ELAM, MCKEE, LITTLE & FROST, and SMITH, CAMBORN & SMITH, for appellant.

CONNER & MCINTOSH and MORRIS, INNIS & MORGAN, for appellee.

MCCABE, J. — The appellee recovered judgment against the appellant for a personal injury. The appellant's demurrer to the

complaint for want of sufficient facts was overruled. It was shown in the complaint: That the appellant, a private corporation, was engaged in manufacturing carriages. That the appellee, on the 12th of December, 1895, and for six months prior to that date, was an employee of the appellant in its shops. That on that day, and for several days before, the appellee, by order of the appellant, was operating a rip saw in appellant's factory, as its employee. That the table in which the saw was situated, and the saw, at the time of the injury complained of, were defective and out of repair, as follows: That the table should have been so situated that the top thereof would be level, but the floor on which it stood had given way and sunk down, causing the top of the table to stand in a slanting position; that the slot irons upon the table should have been even with the top of the table, so that the top of the table would have a smooth and even surface, but the slot irons had become raised as much as one-fourth of an inch above the top of the table; that the saw should have stood perpendicular, but its top stood one-fourth of an inch from a perpendicular line. That said defects in the saw and table had existed for several days, and the appellant had full knowledge of said defects. That by reason of said defects the hazards of operating the saw were greatly increased. That on said day, while the appellee was operating the saw, by the orders of the appellant, as its employee, the piece of timber that he was then cutting with the saw was, by reason of said defects in the saw and table, caught by the saw in such manner as to quickly turn said piece of timber, and the piece of timber being thus unexpectedly and quickly turned, the appellee's hand was thereby thrown against the saw, whereby his hand was cut and mangled by the saw to such extent that the hand and the use thereof were entirely and forever destroyed, and he had suffered, and still suffered, great pain from the injury. It was further alleged that the appellant, from time to time before the appellee received said injury, promised him that it would cause the saw and table to be repaired; that appellee had not been operating the saw for several days prior to the happening of said injury; that on the morning of said day the appellant promised the appellee that it would repair said saw and table as soon as the job of work that the appellee was then working on was completed; that the appellee, relying upon said promise, by order of the appellant commenced to operate said saw, and was injured within two hours thereafter, and before said job of work was completed; that the appellee, relying upon said promises to repair the saw and table, and at the request of the appellant, continued to operate the same until he received said injury, believing from day to day that the

appellant, in pursuance of its promise, would repair said defects in the saw and table; that at the time he received said injury he was operating the saw with due care, and was free from any fault or negligence on his part; that said injury was occasioned wholly by said defects in said saw and table and the negligence of the appellant; that by reason of said injuries the appellee was damaged in the sum of, etc.; wherefore, etc. The correctness of the ruling on the demurrer is called in question by the assignment of errors. This appeal was taken to the appellate court, where the jurisdiction thereof primarily belonged, the amount of the judgment being only \$2,000. Rev. Stat. 1894, sec. 1336 (Horner's Rev. St. 1897). Section 25 of the appellate court act provides: "That in any case pending in the appellate court, in which said appellate court shall conclude that any decision of the Supreme Court should be overruled or modified, it shall be their duty to transfer said cause with their opinion of what the law should be held to be, to the Supreme Court, and the Supreme Court shall thereupon have jurisdiction of and decide the entire case, the same as if it had original jurisdiction thereof and it may either modify, overrule or affirm its former decision on that question as it shall deem right." Rev. St. 1894, sec. 1362; Acts 1893, p. 29. Under this provision the appellate court transferred this appeal to this court, saying, in their opinion transferring the cause, that: "In the argument before us there has been much discussion of two comparatively recent cases in our Supreme Court. *Burns v. Manufacturing Co.*, 146 Ind. 261, 45 N. E. Rep. 188, and *Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. Rep. 14, 2 Am. Neg. Rep. 510." After much discussion, the citation of numerous authorities, with copious quotations therefrom, the appellate court says: "With such conclusion [reached in those cases] we cannot find ourselves able to agree. These cases seem from the claims of counsel in argument to be regarded as establishing a new rule of exceptions in this State, which, as we think, is not supported by sound reason or good authority;" and therefore the appellate court recommends the overruling of those cases.

The numerous authorities cited and quoted from in the opinion of the appellate court are not inconsistent or in conflict with the two cases it recommends to be overruled. In the last one of those cases, — *Oil Co. v. Helmick*, *supra*, — being to some extent founded on the first one, it is said: "Appellee, however, has placed most of his reliance on the claim put forward that the facts found bring him within the exception to the general rule that the employee who continues in the service of his employer after notice of a defect in machinery, tools, or working place, augmenting the danger of the

service, assumes the risk as increased by the defect, the exception being that he does not assume such increased risk if the master expressly or impliedly promises to remedy the defect. * * * The promise of the master is the basis of the exception. *Railroad Co. v. Watson*, 114 Ind. 20-27 (14 N. E. Rep. 721, and 15 N. E. Rep. 824), and authorities there cited on latter page. The ground on which the exception rests is the inducement held out to and influencing the servant by the master's agreement to repair. If he remains in the service of his master after knowledge of the danger, in the absence of a promise of the master to repair, he assumes the risk. *Railroad Co. v. Watson*, *supra*. In case of such promise to repair by the master, relied upon by the servant, inducing him to remain in the service, the servant may recover for an injury caused by such defect within such period of time after the promise as would be reasonable to allow for such repairs to be made. *Corcoran v. Light Co.*, 81 Wis. 191, 51 N.W. Rep. 328; *Railroad Co. v. Watson*, *supra*; *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. Rep. 30; *Burns v. Manufacturing Co.*, 146 Ind. 261, 45 N. E. Rep. 188. But here the promise was not to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as the present order was run out. How long that would take — whether a week, thirty days, six months, or a year after the promise was made — is not found in the special verdict. For aught that appears, it may have required thirty days or six months to run out that order. At the end of that time the promise was to repair. That being so, there could have been no inducement influencing the appellee to remain in the service, and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obviated, as is the case where the promise is to repair generally, implying it is to be done within a reasonable time. In *Railway Co. v. Watson*, it was said on page 30, 114 Ind., and page 726, 14 N. E. Rep.: 'Now, if there had been a promise to furnish a lantern at the end of the thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation that a lantern would be furnished.' So, in the case before us, there could be no expectation on the part of the appellee that any repairs were to be made during the time required to run out the order on which appellee was at work at the time the promise was made. And hence, during that time whatever its length was, the promise would not relieve plaintiff from the risk incurred by working without such repairs.' The present case is controlled by the rule just stated, if it be sound and good law. It only differs from the case quoted in that the promise to

repair was as soon as the job the servant was then working on was completed, without any showing how long it would take to complete the job, but showing that the injury occurred before the completion of the job.

The appellate court points out no specific reason why the two cases referred to ought to be overruled, except the general statement that they are regarded as establishing a new rule of exception in this State, which that court thinks is not supported by sound reason or good authority. *Oil Co. v. Helmick*, *supra*, is certainly directly supported by the cases therein cited, among which is the case in 114 Ind., 14 N. E. Rep., and 15 N. E. Rep. No reason is suggested why the appellate court regards that case not good authority, or why it regards the other cases cited in the *Oil Co.* Case as not good authority. Nor is any reason suggested by the appellate court why the two cases referred to establish a new rule of exception in this State. It is not a new rule of exception unless the *Watson Case*, in 114 Ind., 14 N. E. Rep., and 15 N. E. Rep., is new. That case was decided about eleven years ago. The substance of all the authorities on the subject is to the effect that a servant who works with tools, machinery, or appliances so defective as to augment the danger of the service, with full knowledge of such defect, is held thereby to impliedly agree that he will run the risk of danger, or that he impliedly agrees to continue in the service at his own risk of injury to himself from such augmented danger. The only exception to this rule is where the master agrees to repair or remedy the defect. Such promise has the effect, by all the authorities, to relieve the servant from the implied agreement, which the law raises against him from his continuance in the service with knowledge of the defect, that he will so continue at his own risk. But that relief is not unlimited. The promise to repair only has the effect of relieving him from his implied assumption of the risk for such length of time as would be reasonably sufficient in which to make the repairs or remedy the defect, and in which he might reasonably expect the same to be done. If the injury occurs within that period, the injured servant may recover, because he is relieved during that period from his agreement, implied by law from his knowledge, that he will serve on at his own risk. This relief is afforded to him because he may during that time reasonably expect the repairs to be made, or the defect remedied. Where, however, the agreement to repair or remedy the defect is, as in this case, not to be begun until after the job on which the servant is then at work, the agreement is not operative until that time arrives, because during the time which intervenes between the making of the promise and the time when

the promise is to be performed the servant has no reason to expect the repairs to be made or the defect remedied. And hence, during that time, there is nothing to relieve him of his agreement implied by law from his continuation in the service with knowledge of the augmented risk caused by the defect, any more than during the time prior to making the promise to repair. In this case the complaint shows that the injury occurred before the time had arrived in which the repairs were promised to be made. It therefore shows that at the time the injury occurred the injured servant had no reasonable ground to expect the repairs to be made, and hence that he was not relieved by the promise from his implied assumption of the risk. The Circuit Court therefore erred in overruling the demurrer to the complaint.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

KRENZER v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

Supreme Court, Indiana, December, 1898.

PERSON NEGLIGENTLY PLACING HIMSELF IN PERIL AND INJURED AFTER KNOWLEDGE THEREOF BY ANOTHER WHO INFLICTED IT. — Though a person placed in peril by his own negligence may recover damages for an injury inflicted by another who by the exercise of ordinary care after discovering the situation might have prevented the injury, the rule does not apply in the case of a boy seven and a half years of age who fell asleep on the track of a railroad and was run over by a train that was run at excessive speed and without the bell being rung, where those in charge of the train did not discover the boy in time to avoid injuring him (1).

CONTRIBUTORY NEGLIGENCE. — Evidence that a boy seven and a half years of age went to sleep on a railroad track, that he knew trains were run thereon and that if he remained on the track he was liable to be run over, shows such contributory negligence as will bar a recovery.

THIS was a petition for rehearing. The former opinion is reported in 43 N. E. Rep. 649.

BECKETT & DOAN, CHRISTIAN & CHRISTIAN, and SMITH & KORBLY, for appellant.

SAM'L O. PICKENS, for appellee.

1. See *Mo. Pac. R'y Co. v. Prewitt* identical and the court held as in the *(Kansas, November, 1898)*, 5 Am. Neg. Indiana case above reported. Rep. 29, where the facts were almost

HOWARD, J. — We have given careful consideration to the learned argument of counsel in support of the petition for a rehearing. Nothing said, however, has been sufficient to convince us that the rule heretofore enforced by this court in relation to contributory negligence in injury cases should not be maintained. There is no doubt, and never has been, that, if a person is injured by the act of another, the injured person will thereby have a right of action for damages, even though he was himself not free from fault, provided only the person injuring him knew of his condition, and could, with ordinary care, have avoided the injury complained of. In the recent case of *Railway Co. v. Stick*, 143 Ind. 449, 41 N. E. Rep. 365, it was said, citing *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. Rep. 132: "If the employees see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man." This would be true, although the man had himself been wholly at fault, even so far as to have caused himself to be tied upon the track. So, it is said in *Louisville & N. R. Co. v. East Tennessee, V. & G. R'y Co.*, 9 C. C. A. 314, 60 Fed. Rep. 993, cited by appellant: "If, with a knowledge of what the plaintiff has done or is about to do, the defendant can, by ordinary care, avoid the injury likely to result therefrom, and does not, defendant's failure to avoid the injury is the last link in the chain of causes, and is, in law, the sole proximate cause. The plaintiff's conduct is not, then, a cause, but a condition, of the situation with respect to which the defendant has to act. The principle is established by a long series of cases," — citing *Davies v. Mann*, 10 Mees. & W. 546 (1), and many other cases. The statement so cited with approval in appellant's brief is quite consistent with the rule established in this State. If, "with knowledge" of the plaintiff's condition, whether that condition has been brought about by

1. In *Davies v. Mann*, 10 Mees. & W. 546, an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon which, without its driver, was coming at a smartish pace along the road. *Held*, that the jury was properly directed, that, although it was an illegal act on the part of the plaintiff to

put the animal on the highway, still unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover.

In such action it was also stated that the general rule of law respecting negligence is that although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover.

plaintiff's fault or not, defendant can, by ordinary care, prevent the threatened injury, he must do so, or become liable for the injury.

We think that counsel are perhaps right in calling in question the propriety of an attempted distinction made by a dictum in *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, between what is there called the English doctrine, illustrated by the case of *Davies v. Mann*, *supra*, and the doctrine accepted in this State. We do not perceive any difference in principle between what are called the two doctrines, however difficult it may be to apply the accepted rules of the law of negligence to particular cases. In every case, one who has himself contributed to his own injury must suffer the consequences of his own want of due care, unless it should appear that the one injuring him knew of his condition in time to have avoided the injury, and could with ordinary care have avoided it. To knowingly injure another, when, with ordinary care, such injury could be avoided, is not, however, mere negligence, but rather wilful wrongdoing, or, at least, such a wanton disregard of consequences as amounts to wilfulness. In some cases, we readily admit, it may be hard to draw the line between simple negligence on the one side and wilfulness or wantonness on the other. Carelessness may be so gross as scarcely to be distinguishable from wantonness, or from a willingness to do any act, no matter what the consequences. But, in principle, the injury suffered, if wrongful, must always be due either to a willingness to do wrong, or to a want of care to avoid such wrong. The act done is either positive or negative in its character; that is, either wilful or negligent. Contributory negligence is not a sufficient answer as to wilful wrongdoing, but it is as to simple negligence or want of ordinary care.

In the case before us, the injured boy, after playing upon the railroad crossing, sat upon the rail of the track, and there fell asleep, and was hurt by the passing train. It was between seven and eight o'clock of a summer evening, though still daylight. The engineer was at the time looking out ahead, but neither he nor any one else on the train saw the boy. It is not claimed that these facts show any wilful injury on the part of the employees of appellee, or any wanton disregard of plaintiff's rights, though it is admitted that the employees were negligent in running the train faster than allowed by ordinance, and without ringing the bell or sounding the whistle. Here, then, is a case where the injured person was himself guilty of negligence contributing to his injury, and where the persons injuring him did not see him, although the engineer was looking out ahead, and did not, of course, know of his condition. Under these circumstances, even accepting the authority of the cases cited by appellant,

there could be no recovery. No wilful or even wanton injury is shown, and the contributory negligence of appellant is undoubted. In a note to *Railroad Co. v. Humphreys* (Tenn.), 15 Am. & Eng. R. Cas., at page 478, the rule in cases of this kind is, as we think, well stated. It is there said: "The act of falling asleep or being drunk and incapable upon a railroad track is generally held to be such contributory negligence as will preclude recovery in case of accident,"—citing many cases, and adding: "It is, of course, to be understood that, when the servants of the company fail to exercise due care after becoming aware of the plaintiff's dangerous position, the company is liable, notwithstanding plaintiff's contributory negligence." See, further, *Railroad Co. v. Huffman*, 28 Ind. 287; *Wright v. Brown*, 4 Ind. 95; *Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. Rep. 676; *Railroad Co. v. Adams*, 43 Ind. 402; *Conner v. Railroad Co.*, 146 Ind. 430, 45 N. E. Rep. 662; *Elliott R. R.*, secs. 1251, 1257.

But it is said that as the injured party in this case was at the time but seven and one-half years of age, and as a general verdict was returned in his favor, it follows conclusively that all the facts necessary to entitle him to judgment, including the fact as to his having sufficient capacity to comprehend and realize the danger incurred by him in sitting down to play upon the railroad track, were found for him by the jury, unless it should appear from answers to interrogatories that facts specially found were in irreconcilable conflict with such general verdict. There is no question that this is the law. It is, however, shown in the original opinion that such irreconcilable facts as to the capacity of the injured boy were found by the jury. The jury found specially that the boy was seven and one-half years old; that he was "of usual and ordinary intelligence and judgment for his age," and "of ordinary physical strength and activity for his age; that he knew "that the track at the place where the accident happened was used to run cars and engines over;" that, just before he was hurt, he was playing jackstones upon the track, and sat "down upon the rail of the track with his feet between the rails," and that, "while sitting there in that position, he fell asleep, and remained asleep until he was hurt;" that, when the engine struck him, he was "lying with one leg over the rail, body off north side of rail;" that "the plaintiff, when he sat down upon the track, had sufficient intelligence to know that the track was used to run cars over," and "that engines and cars were liable to pass over said track;" and that, "at the time he sat down upon the track, he had sufficient intelligence to know that if he remained on the track, and an engine or car passed over it, he would be run over and injured." The capacity of the plaintiff to comprehend the danger thus incurred

by him, as so found by the jury, cannot be distinguished from the capacity of an adult in the same circumstances which would make such adult chargeable with contributory negligence. We think it absolutely clear that the negligent conduct of the plaintiff, and his full appreciation of the possible consequences of such conduct, as found by the jury, must make him, as well as any other person, chargeable with negligence contributing to his injury. There is therefore no room here for the application of the rule laid down in *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. Rep. 714, and like cases, — that, where it is uncertain whether the primary facts found show negligence, the jury are permitted and required to find as an ultimate fact whether the plaintiff has or has not exercised such care as an ordinarily prudent person would have exercised under the circumstances. The facts here found by the jury disclose beyond question that the plaintiff was guilty of conduct showing him to be chargeable with negligence contributing to his own injury, and that he was at the time possessed of sufficient intelligence to know and appreciate the danger thus incurred by him.

Neither can it be that the company could be liable under the circumstances as for wilful wrongdoing, unless, indeed, those in charge of the train knew that the boy was upon the track. But here, again, the jury find expressly that the engineer was "looking out ahead of the engine at and before the time plaintiff was run over," and also that neither "the engineer nor fireman nor any one on the engine saw the plaintiff before he was run over." There was therefore no wilful or wanton injury. Indeed, none is charged in the complaint. But, as already said, in order to charge the company with responsibility, there must have been either wilfulness or wantonness on its part, or else negligence; and in the latter case the plaintiff must himself have been free from contributory negligence, which, as we have also seen, was not the case. Under any possible view, therefore, the plaintiff could not recover.

Petition overruled.

MCCABE, J., dissented, and in the course of his opinion said: "After a careful and painstaking examination of the questions presented on the petition for a rehearing in this case, I find myself wholly unable to agree with the majority of the court in holding that the petition for a rehearing ought to be overruled. I concur in that part of the original opinion holding that the appellee railroad company was guilty of negligence in running its engine at the time and place it ran over appellant's leg, and inflicted the injuries complained of, and I also concur in the original opinion in holding that appellant, at the time and place, being at and on a highway crossing

of the railroad track, was not a trespasser. But I do think this court erred in the original opinion in holding that the appellant was guilty of such contributory negligence as defeated his right of recovery. -

"I think it quite clear that the law presumes that the engineer did see the sleeping child on the track in time to avoid running over it, because he might have seen it had he looked (*Railway Co. v. Pitzer*, 109 Ind. 179, 6 N. E. Rep. 310, and 10 N. E. Rep. 70); and hence his negligence in running over it was the proximate cause of the injury to the boy, and his negligence in going and falling asleep on the track, if negligence it was, was not a proximate cause of such injury, but was a remote cause or a mere condition of such injury."

TREZONA V. CHICAGO GREAT WESTERN RAILWAY COMPANY.

Supreme Court, Iowa, December, 1898.

CARRIER AND PASSENGER — PRESENTING TICKET THAT BY ITS TERMS HAD EXPIRED. — One who purchases a first-class ticket marked across the face of it the words "Not good after date of sale" is not entitled to passage over the railroad issuing it when presented a year after its date.

REFUSAL TO PAY FARE — EJECTION. — Such person is a trespasser when he refuses to pay fare after the ticket has been rejected and cannot recover damages for his ejection from the train, nor is he entitled to recover the value of the ticket.

PLEADING. — In order to be available the waiver of a defense that the ticket presented was by its terms good only on the date of sale must be pleaded.

APPEAL from judgment, District Court, Delaware County, in favor of plaintiff.

On the 13th day of October, 1893, the plaintiff purchased from defendant agent at Dubuque, Iowa, a passenger ticket from Dubuque to Lamont, Iowa, paying therefor \$1.75, that being the first-class regular fare. Across the face of the ticket in red ink were the words, "Not good after date of sale." The ticket was not offered for passage until November 17, 1894, when plaintiff and his wife took defendant's train at Dubuque for Lamont, and when a little out of Dubuque the conductor asked for plaintiff's ticket, and he presented the one described, which the conductor refused to receive, and demanded fare, which was refused, and for failure to pay his fare he was ejected forcibly from the train at the next station, and only permitted to enter on payment of the regular fare, with ten cents extra.

D. W. LAWLER, D. E. LYON, and D. J. LENEHAN, for appellant.

DUNHAM, NORRIS & STILES, for appellee.

GRANGER, J. — 1. It does not appear why the ticket was not used on the day of its purchase, nor does it appear that plaintiff did, on the day of the purchase, notice the limitation on the ticket, but he did know of it before he took the train on the 17th day of November, 1894. He says he had such knowledge, but thought the provision was unreasonable, and that, as he had paid for the passage, he had a right to it, notwithstanding the provision on the ticket. The arguments in this case take a wider range than the controlling legal proposition requires. A few significant facts, first stated, will do much towards clearing the way to the particular question that controls the case. Plaintiff had no ticket that purported to entitle him to ride on the train from which he was ejected. It expressed on its face that he had no such right. The ticket contained the only evidence of the understanding under which it issued. Hence the conclusion is manifest and certain that the plaintiff was attempting to ride on a train for which he had no ticket, and for which neither he nor the company understood the ticket to be good. He expressly says that he knew of the limitation as to time for its use, but thought it was unreasonable. His evidence shows that he thought he was entitled to the ride "without any reference to the ticket;" that he was entitled to the ride, because he had paid for it. The arguments deal quite elaborately with the question whether such a limitation on a ticket is legal, the thought being that it is so unreasonable as to be against public policy. We do not think such a question is involved. It is not like a case where a ticket is apparently good on its face, as, where it is silent as to the time in which it may be used, and some rule or custom of the company limits its validity to a certain period, so that the purchaser has what he understands to be good, and what on its face appears to be so. The question that controls this case is not, did the company, because of the payment at one time of a fare, owe plaintiff a passage to Lamont, but did he present to the conductor a ticket that entitled him to such a passage? It is not sufficient that he was entitled to a passage, but he must obtain it in the way provided by the regulations of the company, that are sustained by the law of the land. In *Ellsworth v. Railway Co.*, 95 Iowa, 101, 63 N. W. Rep. 584 (1), we considered a question

1. *Ellsworth v. Chicago, B. & Q. R'y Co.*, 95 Iowa, 98, 101, is reported in 8 Am. Neg. Cas. 252.

For actions relating to ejection of passengers from trains, etc., from the earliest period to 1896, see vol. 8, Am.

Neg. Cas., where the same are classified according to States. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

quite akin to this, except that we there dealt with the obligations of the company when a ticket, good on its face, was presented, and a rule of the company made it void. We there collated some authorities, and quoted somewhat from the discussions bearing on the rights of passengers with and without tickets entitling them to transportation on particular trains. Speaking to the question of a proper remedy, we said, in the *Ellsworth Case*, that in determining such a question we should keep in mind the difficulties to be met with and overcome in a successful management of the railway passenger traffic of the country, both as to the public and the carriers; and that to such an end it was clearly important that there should be rules for the guidance of the employees in the different parts of the service; and that such rules should be conclusive as to their course of conduct, even though at times the rule might operate to the prejudice of an individual passenger. As a conclusion of our discussion in that case, we said: "It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor." That language was used in considering what character of a ticket a conductor might or might not refuse, which question was directly involved in the case. The statement is followed by a reference to cases on both sides of the proposition, being, as we there stated, not harmonious. This question, on principle, was to some extent involved and settled in *Stone v. Railway Co.*, 47 Iowa, 82 (1). In that case there was a coupon ticket from Clinton to Sioux City, Iowa, the coupon first used being from Clinton to Missouri Valley. The conductor, out from Clinton, punched the coupon to Boone, Iowa, and returned it to the passenger. A conductor's check told him he must get a special check to stop over. At Marshalltown he left the train without a special check, and resumed his journey on the train the next day, and to that conductor he presented his ticket punched, and his conductor's check. These, properly read, showed him not entitled to transportation on that train to Boone, although he had paid his fare, and had not passed over that part of the route. It is true that the case turns largely on the fact that by leaving the train in violation of the regulations known to him his contract was at an end, so that he was not entitled to transportation until a new contract was made. The same is to be said in this case. By not using the ticket within the time fixed by it, his rights under the ticket were at an end, and, before he could rightfully claim a passage, he must obtain a ticket entitling him to one. For that purpose he should apply to the agent of the

1. See notes of Iowa cases in 8 Am. Neg. Cas. 252, 253.

company authorized to issue tickets, and there urge his claim, if such he had, to a ticket, because of his former payment, and not attempt its adjustment with the conductor, whose duty it was to take up and cancel, and not to issue, tickets. Had he not presented the ticket, but claimed a passage, because, more than a year before, he had purchased one, and had not used it, we assume no one would contend that he was entitled to a passage, and why? Because public policy, as well as public sentiment, would condemn a rule so palpably unreasonable. How do the cases differ? In the case assumed, the conductor may deny the passage, because he is not required to accept the word of the passenger, even though it is true. In the case at bar he presents a ticket that on its face negatives his right to a passage. In *Bradshaw v. Railroad Co.*, 135 Mass. 407, it is said: "It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under this contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." See, also, *McKay v. Railway Co.*, 34 W. Va. 65, 11 S. E. Rep. 737 (1), and other cases there cited, where the rule is announced that: "As between the passenger and the conductor, the ticket is the conclusive evidence of the passenger's rights." Appellee concedes the right of the company to limit the life of a ticket, but insists that the limit must be reasonable. This ticket was held for thirteen months before there was an attempt to use it, and, without determining the question of the limitation being unreasonable, it is to be said that the limitation expressed in no way operated to the prejudice of the plaintiff.

2. In this case the conductor took up the ticket, and then demanded the fare, and reliance is placed on that fact as being a waiver of the limitation, and the court instructed that the limitation on the ticket was reasonable, but that, if the company took up the same within the statute of limitations, then the passenger was entitled to ride thereon. Error is assigned on the instruction, and we dispose of the point on this theory: That the case presents no issue of waiver. The defendant pleaded the limitation of the ticket as a defense. If

1. *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, is reported in 8 Am. Neg. Cas. 662.

plaintiff relied on a waiver of the condition, it must have been pleaded. *Eiseman v. Insurance Co.*, 74 Iowa, 11, 36 N. W. Rep. 780, and numerous cases there cited. The invalidity of the ticket, after October 13, 1893, is pleaded in the answer, and, if plaintiff desired to show a waiver of the conditions, he must, under the authorities, have pleaded it in a reply, and no reply was filed; nor does such a plea appear in the pleadings filed. It was error to instruct on the question.

3. The court gave the following instructions: "7. You are further instructed that a railroad company has a right to make a rule that upon the issuing of every first-class ticket the use of the same is limited to the day and trip for which the ticket was purchased, and such a rule is in law reasonable. 8. But in making such a rule as is named in the last instruction, they have no right to make one that would render the ticket absolutely void, and of no value, after the date and trip for which the ticket is issued; and such a rule, you are instructed, would be unreasonable. 9. You are further instructed that a first-class railroad ticket, when purchased, and its value limited to the day of sale and trip for which it was sold, and it is not used within that limit, does not entitle the owner, as a matter of right, to transportation after that time, but it is, nevertheless, of value to the holder during the statute of limitation, and the value of such ticket, in the absence of any other proof, is in law presumed to be the amount the purchaser paid therefor. 10. You are further instructed that a railroad company has a right to make a rule and direct its conductors to refuse to honor a ticket after the day and trip for which it was issued; and, if a conductor does so, and collects fare from the passenger, he is in the line of his duty; and, if the passenger refuses to pay said fare on demand, then the conductor has a right to remove him from the train unless he pays full fare between the points of his travel, with ten cents added, using no more force than is necessary therefor." Exceptions were taken to those numbered 8, 9, and 10. The seventh instruction is not questioned, and must stand as the law of the case. It holds, as a matter of law, that the limitation on the ticket was reasonable, in so far as a right of passage was concerned, and, with the question of waiver out of the case, there could be no recovery for the ejection from the train, for the plaintiff refused to pay his fare, and held no ticket that gave him a right of passage, and hence he was not a passenger, but a trespasser. See *Stone v. Railway Co.*, *supra*. The instructions hold, as a matter of law, that, notwithstanding the limitation was reasonable, the plaintiff might recover back the amount paid for it; that is, they hold that it would be unreasonable to make the ticket value-

less if not used, and that its value would be the amount paid for it, in the absence of proof to the contrary. This must mean that the holder of a railroad ticket, who does not use it for a passage during its life for such a purpose, is entitled, as a matter of law, to have the purchase price refunded. No authority is cited to support such a rule, and we do not believe it is the law. It contravenes all general principles on the law of contracts. The contract of carriage imposed on the company an obligation to be prepared to perform the contract on its part by the equipment and operation of its train, and we do not see why, when the ticket was purchased so that the company was bound by its terms, the plaintiff was not alike bound; that is, he must accept what he has purchased, or lose it. This question received but a passing notice in argument, and we leave it without further elaboration.

The judgment must be reversed.

McMAHON v. CITY OF DUBUQUE.

Supreme Court, Iowa, December, 1898.

MUNICIPAL CORPORATIONS—HOUSE BURNED THROUGH NEGLIGENCE.—Where in making a contract for macadamizing its streets, a certain stipulated price per square yard was deducted, by a city, from the estimate for the use of the city's steam roller, and the city's agents used the roller without suggestions from the contractor, and the city retained its stipulated price, the city could not escape liability for a fire set by sparks from the roller, on the ground that the roller was used for the benefit of the public.

DAMAGES—HOUSEHOLD GOODS.—The cost alone of household goods and wearing apparel in use by a family is not the measure of damages for their loss through burning by negligence, but their actual value based on the cost, condition and age.

SAME—Its actual value before the fire of a house burned through negligence is the measure of damages, and not its market value.

APPEAL from judgment of District Court, Dubuque County, in favor of plaintiff in action for damages from a fire caused by sparks from the smokestack of a steam road roller, owned and operated by the city of Dubuque, while rolling newly laid macadam on a street on which the plaintiff's lot abutted, and on which was the house which, with its contents, was destroyed.

DUFFY & MAGUIRE, for appellant.

LONGUEVILLE, MCCARTHY & KENLINE, for appellee.

LADD, J. — The household goods and wearing apparel of the plaintiff and his family were destroyed. These had been used, were worn, and somewhat out of style. Such property has no recognized market value, and recovery must be based on its actual value. *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. Rep. 137, and 25 N. W. Rep. 159; *Clements v. Railway Co.*, 74 Iowa, 442, 38 N. W. Rep. 144. To ascertain the actual value, it was proper to take into consideration the original cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, and from all these determine what they were fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price, in connection with wear, depreciation, change in style, and present condition. *Luse v. Jones*, 39 N. J. Law, 707; *Railway Co. v. Nicholson*, 61 Tex. 550; *Lumber Co. v. Wilmore* (Colo. Sup.), 25 Pac. Rep. 556; *Printz v. People*, 42 Mich. 144, 3 N. W. Rep. 306; *State v. Hathaway*, 100 Iowa, 225, 69 N. W. Rep. 449; *Latham v. Shipley*, 86 Iowa, 548, 53 N. W. Rep. 342. The cross-examination of Lizzie McMahon indicated that she spoke only of the actual value, and not of the market price.

2. A witness was not permitted to testify whether the house destroyed was in good repair, because merely an opinion. The value of the house was in controversy. The condition of a dwelling house as a whole is not observable, except upon examination, and for this reason does not come within the rule of *Kelleher v. City of Keokuk*, 60 Iowa, 474, 15 N. W. Rep. 280, that testimony of matters within the observation of all are to be treated of as facts rather than opinion. There might well be wide differences of opinion as to what would constitute good repair, and the court rightly held that the house might be described in detail, and from such evidence the jury determine its condition.

3. The evidence was received, over the defendant's objection, showing the actual value of the house at the time of the fire, and, it is said, this does not furnish the true basis of recovery. The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and, in order to give satisfaction, measured in money, such rules are formulated as are thought best adapted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the

ground on which they rest. It is thus put by Mr. Sutherland in his work on Damages (volume 3, p. 368): "If the thing destroyed, although it is a part of the realty, has a value which can be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery may be the value of the thing thus destroyed, and not for the difference in value of the land before and after such destruction." In *Drake v. Railway Co.*, 63 Iowa, 310, 19 N. W. Rep. 215, crops were destroyed by overflow caused by an embankment, and the measure was held to be the difference between the market value of the land immediately before and after the injury. This rule was approved in *Sullens v. Railway Co.*, 74 Iowa, 660, 38 N. W. Rep. 545, and applied, where growing trees were burned, in *Greenfield v. Railway Co.*, 83 Iowa, 276, 49 N. W. Rep. 95, and *Brooks v. Railway Co.*, 73 Iowa, 182, 34 N. W. Rep. 805. See *Smith v. Railroad Co.*, 38 Iowa, 518; *Striegel v. Moore*, 55 Iowa, 88, 7 N. W. Rep. 413. In *Rowe v. Railway Co.*, 102 Iowa, 288, 71 N. W. Rep. 410, 3 Am. Neg. Rep. 647 (1), the court said: "Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage of the realty itself." It is apparent that the growing crops, small trees, and orchards are of little or no use separated from the soil, and that their value must necessarily be determined in connection with the land on which they stand. This is not true of improvements which may be replaced at will. In *Graessle v. Carpenter*, 70 Iowa, 167, 30 N. W. Rep. 392, the defendant, by digging trenches and laying water pipes, injured the plaintiff's fences, walks, house, and shrubs. It was not shown the acts were of such a nature as to permanently injure the real estate, or that it could not be restored to its condition before the fire. The court, through Beck, J., announced the rule to be that which will "give the plaintiff just and full compensation."

* * * In the case before us the familiar and simple rule applicable to such cases would perfectly attain that end. That rule is this: The plaintiff may recover as damage the sum which, expended for the purpose, would put the property in as good condition as it was in before the injury, with the additional sums which would compensate the plaintiff for the use and enjoyment of the property, should

1. See note of recent cases relating to damages to property caused by emission of sparks from locomotives and railroad fires, 3 Am. Neg. Rep. 705-709.

he be deprived thereof by the injury, and the value of such property, as trees, buildings, and the like, which have been wholly destroyed, and cannot be restored to the condition they were in before the injury." We take it, the trees and shrubs were of a character which might be replaced by others of the same actual value; otherwise the case is not in harmony with those cited. In *Freeland v. City of Muscatine*, 9 Iowa, 465, the defendant, in changing the grade, dug away the dirt, and caused the plaintiff's house to fall, and it was held: "The cost of rebuilding or repairing was properly taken into consideration, if we understand it as having reference to the quality and condition of the building before the accident, and the instruction cannot be taken in any other sense. It is the cost of rebuilding and repairing which implies the restoring it to as good a condition as before, and not the putting a new and firm building in the place of an old and decayed one." To prove the market value of the land immediately before and after the fire would be accomplishing, by circumlocution, what might be directly ascertained, for such difference would be the value of the house. True, location may sometimes have a bearing, as where a building is so situated as not to be useful for the purpose of its construction. In such cases this must be taken into consideration in fixing the real value. But it could be as readily done in estimating this separate from as with the land. Simplicity and directness are particularly favored in modern jurisprudence. True, such property may have no market value. It does, however, have actual value, and this is then the measure of recovery. The ruling was right.

4. The alleged negligence of the defendant was the failure to use any device, such as a spark arrester, to prevent the escape of cinders, coals, and sparks from the engine. No other issue as to negligence was submitted, and the state of repair of the engine was not material. Experts, in testifying, were allowed to use a model of a locomotive engine to illustrate the use of a spark arrester, and to indicate how it could be applied to the roller engine, and for no other purpose. The court was careful to caution the witnesses that, "in so far as the different parts of this model are similarly shown in this model to the steam roller, you may call attention to them, but the other parts of the model you are not to mention." We discover no error in this. The model was used to better bring to the understanding of the jury a mechanical device. It was like the use of a plat or sketch by a witness to indicate relative locations or directions.

5. The appellant asserts that in operating the steam roller it acted solely for the public, and not for any private corporate benefit. It may be observed that the defendant is incorporated under a special

charter, and that, by chapter 210, Acts 6th Gen. Assem., it was given the power and made the duty to grade, pave, and otherwise improve its streets, and for this purpose it may levy a special tax on any lot or lots, or the owner thereof, for the purpose of grading, paving, or macadamizing the same, and is authorized to collect it under regulations prescribed by ordinances. That such powers and duties are peculiarly municipal, and injuries occasioned by the negligence of the corporation in carrying out or performing them may be redressed in actions against the city, is not an open question in this State. *Wallace v. Muscatine City*, 4 G. Greene, 373; *Creal v. City of Keokuk*, Id. 47; *Cotes v. City of Davenport*, 9 Iowa, 227; *Ross v. City of Clinton*, 46 Iowa, 606. See collection of authorities generally in note to *Goddard v. Inhabitants of Harpswell (Me.)*, 24 Atl. Rep. 958. Though the city might have, under its charter, contracted with others to properly roll its streets, when macadamized, at the cost of the abutting lot owners, it chose to do this work itself and retain compensation therefor. Contractors were required, in making bids, to include, for Telford macadam, "five cents per square yard, the price charged by the city of Dubuque for the use of the roller and for rolling the street." The contract with Tibey did this, and that amount was detained from the price for such work. It was when rolling the street he had improved that the fire was set out. Had Tibey been employed to do this, as he might have been, and through his negligence, like that of the city, fire had escaped and burned the property of citizens, would any one question the right of recovery? Upon what theory, then, will the municipality escape liability? There are two very satisfactory reasons why it must be held to answer in damages for its negligence: 1. It was engaged in doing, with its own instrumentality, that which it was authorized to contract with another to do at the expense of the abutting lot owners; and 2, the work was voluntarily assumed and carried on for compensation. Mr. Dillon thus states the rule: "The liability of a corporation for its own negligence, or that of its servants, is especially clear, and in fact indisputable, where it has received a consideration for the duties performed, or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit." 2 Dill. Mun. Corp., sec. 881. The city was authorized to make the improvement, but was not bound to undertake it with its own instrumentalities. Having done so, it incurred the same liability an individual would have done in performing like work. We have found no authorities precisely in point, but the principle is so just that none are required. It finds analogy in the cases holding

municipalities, owning and operating water and gas works, docks, piers, and other property, to the same liability as individuals or private corporations with similar ownership and performing like duties. In operating the steam roller, the city was acting peculiarly for the benefit of the municipality, and in a way to enable it to exact compensation from property owners within its limits. Its liability, similar to that of an individual if engaged in doing the same work, is within the principle approved by the authorities generally.

Affirmed.

KANN V. MEYER.

Court of Appeals, Maryland, December, 1898.

ELEVATOR SHAFT—INJURY TO WORKMAN SENT TO REPAIR.—

Where the plaintiff was sent to the defendant's building to repair a freight elevator, the machinery of which was in a pit alongside that of a passenger elevator whose piston rod was about four feet from the shaft of the former when the latter was at the bottom, but when it ascended to the top the rod was within six inches of the shaft, and the plaintiff was not aware of the working of the piston rod, having never seen the elevator before, and went into the pit after notifying defendant of his intention, and while at work in the dark with his back to the passenger elevator was caught and injured by the piston rod, the questions of negligence were properly left to the jury, and a judgment for plaintiff was affirmed (1).

I. *The following are some recent cases arising from Accidents from Operating Elevators:*

In *UNION SHOW-CASE CO. v. BLINDAUER* (*Supreme Court, Illinois, October, 1898*), 51 N. E. Rep. 709, which was an action for injuries sustained by an employee from the fall of an elevator used for freight and employees, and that had a defective appliance known to the employee, but who was unaware of the danger that its use entailed, the court decided that a servant operating an elevator with knowledge of defects does not assume the risk arising from the master's negligence in repairing it, or in informing the servant of dangers known to the master.

In *SIEVERS v. PETERS BOX AND LUMBER CO.* (*Supreme Court, Indiana, June, 1898*), 50 N. E. Rep. 877, it was held

that the using of a freight elevator by employees to ride up and down on, without the knowledge of the employer, on the first day it was operated, and before plaintiff employee was injured on that day, does not affect the fact that it was made to carry freight only, which was known to plaintiff. That plaintiff, by accepting the invitation of a co-employee, who had no authority to ask him to ride on the elevator, to ride up to a certain floor where plaintiff had to go, when there were stairways for the use of the employees, with which plaintiff was familiar, accepts the risk and cannot recover for injury sustained by the fall of the elevator caused by defective gearing.

In *COMMERCIAL CLUB OF INDIANAPOLIS v. HILLIKER* (*Appellate Court, Indi-*

APPEAL from judgment, Superior Court of Baltimore, in favor of plaintiff.

WILLIAM L. MARRURY and J. MARKHAM MARSHALL, for appellants.

WILLIAM COLTON, EDWARD L. WARD, and H. C. SHIMER, for appellee.

BRISCOE, J. — The plaintiff brought suit against the defendants to recover damages for personal injuries received while repairing a

ana, May, 1898,) 50 N. E. Rep. 578, it was held that a demurrer was properly overruled where the complaint showed that the defendant owned and controlled an office building in which were two elevators, both approached by the same hallway, the front one used for passengers, the rear one for freight; that the car of the rear elevator was uninclosed except by the walls of the shaft in which it ran, said shaft being provided with automatic gates at each of the floors; that there was no covering upon the car except the roof of the building; that the decedent entered the building by the said hallway to see some one on the eighth floor, with whom she had business, and attempted to take the front elevator, but was wrongfully prevented by the servant of defendant who was in charge of same, and refused to carry her; that said servant conducted said decedent to the rear elevator and negligently placed her upon it, and negligently started it, but failed to accompany her, and manage the elevator; that it could not be controlled unless said employee was upon it; that decedent was induced to believe that said servant would accompany her, and was on said car, and that when she discovered that he was not, and not knowing how to stop it, she became frightened and terrified, and without any fault on her part, she fell and was thrown from said car at the seventh floor between the elevator car and the wall of the shaft, whereby she was killed.

In *CAVAGNARO v. CLARK* (*Supreme Court, Massachusetts, May, 1898*), 50 N. E. Rep. 542, where plaintiff was in-

jured while attempting to board an elevator, it appeared that as the elevator was about to be lowered the plaintiff came with his wheelbarrow and asked the superintendent who was in the elevator, if he had room to put his wheelbarrow on, and the superintendent replied that there was not much room, the jury could find that plaintiff understood from the reply that the superintendent assented to plaintiff's putting his wheelbarrow on, and that he could infer that he could safely proceed, especially if he had not heard the previous warning of a workman to stand clear, given after a direction of the superintendent to "let her go."

In *ANDRE v. WINSLOW BROS. ELEVATOR CO.* (*Supreme Court, Michigan, July, 1898*), 76 N. W. Rep. 86, it appeared that plaintiff was employed by K., a working foreman of defendant, engaged in finishing elevators which had been placed in a building. K. went into the shaft to screw down bolts in a cylinder and directed plaintiff to hand him a wrench from outside the shaft; while plaintiff was doing this, the elevator that K. had previously gone downstairs to secure or prevent from coming up while they were in the shaft for the five minutes necessary to make the bolts fast, came up and injured him. *Held*, that plaintiff and K. were fellow servants and no recovery could be had.

In *NELSON v. SWIFT & CO.* (*Supreme Court, Nebraska, June, 1898*), 75 N. W. Rep. 1107, where it appeared an employee of defendant went to the elevator door on the fifth floor, opened the door, and not finding the elevator

freight elevator on the defendant's premises. He recovered a judgment of \$5,000, and upon exceptions to the granting by the court of the plaintiff's first and third prayers, and the refusal to grant the defendants' third, fourth, sixth, seventh, eighth and ninth prayers, and to the overruling of certain special exceptions, the defendants have appealed.

It appears from the record that the defendants, Sigmund Kann

there, closed it and rang the bell summoning the elevator to that floor, and then opened the door again and was not seen again until his body was picked up in the shaft below, there was no negligence shown to charge defendant.

In *AULD v. MANHATTAN LIFE INSURANCE CO.* (*Supreme Court, Appellate Division, New York, November, 1898*), 54 N. Y. Supp. 222, it appeared that plaintiff was an employee of defendant, and was injured by being caught by the door while attempting to enter defendant's elevator in order to go to his place of employment on the fifteenth floor of defendant's office building. A nonsuit had been granted and on appeal the court decided: Whether an elevator door, which closes by pneumatic pressure operated by a button in the floor, and which closes with force when the operator's foot is removed from the button, and which, when it has once started to close, cannot be stopped, is a dangerous appliance, is for the jury.

In *BIDDESCOMB v. CAMERON* (*Supreme Court, Appellate Division, New York, December, 1898*), 55 N. Y. Supp. 127, it appeared that deceased, who was an employee of defendant, ascended with a bale of wool on the elevator to the third floor, and then unloaded the wool, taking it to a room on that floor. While he was gone with the wool, the cable which supported the elevator car unwound from the drum, which was in an adjoining shaft, and when he stepped into the elevator it fell to the cellar and he died from the injuries

sustained. The court, on appeal, decided that employers are not insurers of the safety of appliances furnished by them, but they are bound to exercise only reasonable care to supply safe appliances.

In *MCGUIGAN v. BEATTY* (*Pennsylvania, May, 1898*), 186 Pa. St. 329, the question of the master's negligence was for the jury, where an employee, who was in an elevator in the discharge of his duty, having put his hand on it to call up the shaft, was struck by a falling weight, which was part of the apparatus for automatically opening the gate on the floor above; it appearing that the rope attached to it was rotten and had been in use for at least six months prior to the accident, but that blocks which would have prevented the falling of the weight on the rope's breaking had not been in place for several months, and there being no evidence of inspection of the rope.

In *OBERNDORFER v. PABST* (*Supreme Court, Wisconsin, September, 1898*), 76 N. W. Rep. 338, which was an action for death of decedent caused by the alleged negligence of defendant's employee in allowing the car or cage of defendant's elevator to start and fly swiftly upward at the instant the decedent attempted to step into it, whereby the decedent fell into the opening caused thereby and was killed, the court held that the proprietor of an office building is bound to have the passenger elevators operated with the highest degree of skill and care commensurate with or proportionate to the possibility of injury to passengers.

and Louis Kann, trading as S. Kann Sons & Co., were the owners of a certain building on South Broadway, in the city of Baltimore, in which they conducted a "department store." In this building there were two elevators, — one a passenger and the other a freight elevator, — running from the cellar to the top floors; the building being five or six stories high. The machinery of both elevators was located in the basement of the store, in what was called the "elevator room," and adjoining one to the other. These elevators, it is stated, were operated by a hydraulic pushing engine; the machinery of both elevators being the same, and consisting of a wheel about three feet in diameter, over which the cables ran, moving the elevators up and down. The wheel was at the end of a piston rod, and as the passenger elevator ascended to the top floor the piston rod and wheels attached were elongated, so that it came in close proximity to the frame which supported the machinery of the freight elevator. The plaintiff is a machinist by trade, and was at the time of the injury in the employ of Bartlett & Hayward, Baltimore, also machinists, and had been sent by this firm on the day of the accident, at the request of the defendants, to make certain repairs on the freight elevator, which had been broken. The declaration states that on the 8th of December, 1896, the frame or carriage of the freight elevator being broken and out of repair in the cellar or basement, the defendants procured and invited the plaintiff, who was a machinist and iron worker, to come upon their premises for the purpose of repairing and working on the broken freight elevator carriage or frame in the cellar or basement, and that it was then and there the duty of the defendants to exercise ordinary care and prudence to render and keep their premises reasonably safe for the performance by the plaintiff of the purpose or business in hand, and not to expose him to unnecessary risk or danger in the premises, and that, in default and neglect of their duty in the premises, the defendants did not exercise ordinary care and prudence to render and keep their premises reasonably safe for the performance by the plaintiff of the purpose or business in hand, and did expose him to unnecessary risk and danger in the premises, while in the exercise of ordinary care and prudence on his part, whereby and in consequence whereof the plaintiff was crushed, while engaged at work upon the frame or carriage of the freight elevator, by the wheels attached to the piston rod of the passenger elevator, in the cellar or basement, and was permanently injured and damaged about his back and sides, head and limbs, confined to his home for a long period of time, made to suffer great physical pain and mental anguish, incapacitated from working at his trade of machinist or

iron worker, and otherwise injured and damaged. It further appears that at the time of the accident the plaintiff was at work on the machinery of the freight elevator, facing another workman, with his back to the passenger elevator; that while in this position he was caught and pressed against the crossbar of the freight elevator by the elongation of the piston rod of the passenger elevator; that this piston rod was about four or five feet from the position they were at work when the elevator was in the basement, but when it ascended to the top floor the rod extended to about six inches of the crossbar between the two carriages. The case was tried before a jury, and, the judgment being for the plaintiff, the defendants have appealed.

It will be thus seen that the questions presented in this case are the usual ones in damage suits, and they are: First, whether the defendants were guilty of negligence, and, second, was the plaintiff guilty of such contributory negligence as would have warranted the court in withdrawing the case from the consideration of the jury? We have carefully examined the testimony as disclosed by the record, and, without undertaking to review it here, except so far as the purposes of this case may require, we are of the opinion that there was evidence legally sufficient to take the case to the jury upon the questions of fact. The defendants' sixth, seventh, eighth and ninth prayers, and the defendants' special exception to the plaintiff's first prayer, being, then, practically a demurrer to the evidence, were, under the facts and circumstances of this case, properly refused by the court.

In the case of *Donovan v. Gay*, 97 Mo. 444, 11 S. W. Rep. 44, involving a somewhat similar question, the court said: "All the parties knew that the carpenter's work was to be done, and that it could not be done with safety while the elevator was in operation. It was the duty of the defendants' servants to use that care and caution which a prudent person would have used under like circumstances. * * * It was the duty of both the operator and the agent to stop running the elevator when plaintiff made known his intention to perform the work. The duty to stop the elevator arose from the known fact that plaintiff was about to perform the work, which could not be done with safety with the elevator in operation. This is not a case of a trespasser, or one who is in a position where he has no right to be. * * * It was the duty of the defendant to use such care and caution in the performance of the work as a reasonably prudent man would have used under like circumstances, and whether he did use that care or not is a question for the jury to determine under all the evidence. It should be determined only in the light of all the evidence." And in *Indermaur v. Dames*, L. R.

2 C. P. 313 (2), — a case in which a plaintiff, like the one in the case here, was on certain premises on lawful business, in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, — Kelly, C. B., in affirming the judgment of the court below, said: “With respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger, which he knows, or ought to know; and that when there is evidence of neglect the question whether such reasonable care has been taken, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact.” In Cooley on Torts (page 718) the law is thus laid down: “If one expressly or by implication invites others to come upon his premises, whether for business, or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. And this rule obtains and is recognized in both the English courts and in the courts of this country. *Bennett v. Railroad Co.*, 102 U. S. 585; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. Rep. 424; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. Rep. 257; *Gordon v. Cummings*, 152 Mass. 514, 25 N. E. Rep. 978; *Lorentz v. Robinson*, 61 Md. 64, 70; *Benson v. Traction Co.*, 77 Md. 539, 26 Atl. Rep. 973.”

We think there was evidence for the jury, in the case now under consideration, both on the question of want of due care on the part of the defendants, and of negligence on the part of the plaintiff; and, this being so, the court was bound to submit the case to the jury. The plaintiff testified: That when he returned to the store he saw Mr. Kann, who was standing in the store, on the first floor, between the cellar steps and the store door, and was asked by him where that man was who had been working on the elevator in the morning, and answered that he did not know anything about that man. Mr. Kann then told him to hurry up, and get to work on the elevator; and he

2. In *Indermaur v. Dames*, L. R. 2 C. P. 311, 313, affirming L. R. 1 C. P. 274, it appeared that defendant was the occupier of a sugar refinery, in which was a shaft necessary for his business, but open and unfenced. Certain gasfittings were being put up which it was desired to test. The plaintiff was sent by his employer, the gasfitter, to the refinery for that pur-

pose; while so engaged, the plaintiff fell down the shaft. *Held*, that defendant was liable for the injuries. *Held*, also, that any duty on the part of the occupier of a building to provide for the safety of a master workman employed to do work is equally owing to the servant workman whom he may lawfully send in his place.

went down into the cellar, and went to work on the elevator, and had almost finished putting the straps and bolts on when he was caught. That he supposes he was at work, in all, about ten or fifteen minutes before he was hurt. That while he was working on the straps he had his face towards the freight elevator (the one he was working on), and that while he was so engaged he was caught by the piston of the passenger elevator, which he could not hear, and did not know of. He did not know it was dangerous, or he would not have worked there. It ran so easily, and crushed him. That he had a drift pin in one hand, and a wrench in the other, and was standing with his back to the passenger elevator. He was tightening up the bolts on the freight elevator. That he was assisted in his work by a fellow workman named Winkler, who helped him to straighten up the nuts, — he on one side, and Winkler on the other. That he knew it was Mr. Kann he saw in the afternoon when he returned to store, because he heard people call him "Mr. Kann," and that nobody told him that the piston rod worked in a way to catch him while he was at work, and that when he was there in the morning it was standing still, and the same in the afternoon, and he never saw it work, and the freight elevator was still because it was broken. That it was dark in the cellar, where the elevator was, and they got a couple of candles to work by. "That you have to have candles, and that sometimes, when the light goes out, you have to run for matches." That the elevator was not boxed in or fenced in in any way, but that it was all open there. Upon redirect examination the plaintiff testified that, when he said that both of the elevators were in the same "pit," he meant that they were both on the same cellar; and in answer to the question, "You say, in answer to Mr. Marbury, that when you went into the store, when you saw Mr. Kann, you told him to stop the machinery?" the witness answered, "Yes, sir; I told him I was going to work on the elevator in the cellar," and that the occasion was the time of his second visit to the store, in the afternoon of the day of the accident; that he thought the wheels of the freight elevator had been taken away before he went to work there. The testimony further shows that the plaintiff was putting in the bolts with his right hand at the time of the accident, — was putting the nuts on, and tightening them with a wrench; that witness Winkler and the plaintiff were facing each other, and that the plaintiff had his back turned towards the passenger elevator; and that he was about fifteen or twenty minutes engaged in this work, and while he was so engaged the piston rod of the passenger elevator came extending back to where they were at work, and caught the plaintiff, and jammed him up

against the carriage of the freight elevator, on the crossbar. There was other evidence on the part of both plaintiff and defendants, — one tending to show negligence and the other contributory negligence; but as these were questions for the jury, we need not further consider it here. The law of the case was fairly and fully submitted by the court in the plaintiff's first and third prayers, and in the defendants' first, second and fifth prayers. The defendants' third and fourth prayers were properly rejected, and we do not understand that it is contended that they should have been granted. For the reasons we have given the judgment will be affirmed, with costs. Judgment affirmed.

MARYLAND STEEL COMPANY OF SPARROWS POINT V. MARNEY.

Court of Appeals, Maryland, December, 1898.

MASTER AND SERVANT — EMPLOYEE LEAVING PLACE OF SAFETY TO PREVENT INJURY TO FELLOW-SERVANTS. — Where it appeared that in defendant's foundry, molten metal for castings was drawn from the furnace through an orifice called a "tap hole" to open and close which required a person of experience and skill, and that in the absence of the regular tapper, defendant placed a person in charge known to be incompetent, and who so improperly stopped a tap hole that the iron was oozing out, and in danger of bursting through, and injuring employes working below, when the plaintiff, an experienced tapper, left a place of safety, and in order to prevent injury to his fellow-employees, attempted to stop the flow, but was injured before he could apply the stopper, by the metal bursting through the tap hole, the questions of negligence were properly left to the jury.

EVIDENCE. — In such a case it was not error to allow a witness to state whether there was danger to the employees working near the tap hole from an escape of the molten metal.

APPEAL from judgment, Court of Common Pleas, in favor of plaintiff.

J. ALEX. PRESTON and ALEX. PRESTON, for appellant.

WILLIAM L. MARBURY, C. W. KOHLMANN, and C. BOHN SLINGLUFF, for appellee.

PEARCE, J. — This is an action to recover damages for injuries alleged to have been sustained by the plaintiff, John Marney, through the negligence of the defendant, the Maryland Steel Company of Sparrows Point. The appellant is a body corporate engaged in the manufacture of iron and steel, and it owns and operates a

large establishment and plant for that purpose, located at Sparrows Point, in Baltimore county. On the 16th of September, 1895, the plaintiff was in the service of the defendant company, being employed in the foundry where iron castings were made; his special duties being to charge the furnace or cupola with metal, and to see that a proper supply of molten metal was ready for the molder whenever required. The molten metal is drawn from the cupola through an orifice called a "tap hole," near the base of the cupola, and about five feet from the ground. This orifice is from three-quarters of an inch to an inch in diameter, and is closed with clay, which forms an effective plug or stopper to retain the liquid metal. When a flow of metal is required, the tap hole is opened by means of a tap bar, which is a clean, sharp, iron rod or bar, which is driven through the clay stopper into the tap hole, thus opening the orifice, and permitting the liquid metal to flow. Where it is desired to stop the flow of metal, it is done by means of an implement called the "bot stick." This is a round iron rod or bar with a wooden handle, the whole being about three and a half feet in length, with a flat disk on the end, from an inch and a quarter to an inch and a half in diameter. A piece of damp clay is placed on this disk, and is molded by hand into the shape of a cone, completely covering the face of the disk. This stick, with the conical clay stopper upon the end, is driven through the stream of metal into the tap hole, and by a quick turn of the hand and arm the bot stick is withdrawn, leaving the clay stopper in the tap hole; thus closing the orifice until it is tapped for another flow of metal. It is needless to say that the safety of a tapper, and of his fellow-servants whose duties bring them within range of the stream of liquid metal which he controls, requires that he should possess courage, coolness, and skill in his business. The undisputed testimony was that the plaintiff had been a cupola tender for many years, and was an expert in charging and tapping them; that he had been accustomed to the use of the bot stick since 1868, and was considered very skilful in that particular business, — the foreman of the foundry department testifying that the foreman of the shops, who employed all the men in the foundry, brought Marney there "as an experienced cupola man, being such an extraordinary good hand at that work." But his duties in charging the cupola precluded his also performing the regular duties of tapper, and a regular tapper was employed by the defendant company, who was presumably a competent and skilful man, but who was absent on the day of the accident, attending a funeral, and his place was supplied by a man who was known by the defendant to be both unskilful and incompetent. The accident occurred in the following manner: The

cupola was charged from a platform supported by a scaffold twenty feet above the ground, and reached by a stairway. The plaintiff came down the stairs to ask how much metal was required for the next draft, and, being informed, stopped and looked at the man who was then tapping at the east tap hole of the cupola; there being another tap hole in the south side of the cupola. He says, "I seen there was a little something the matter with him, and I jumped up (on the elevation made for the purpose) and stopped her in, and then I went upstairs." Some time after this a workman (one George Strichler, since dead) called out, "John — Oh, Marney! this is leaking over here." And a moment later Doyle, who was foreman of the laborers, and in a position of authority over all of them, called, "Jack, she is getting away on this (the south) side." Whereupon plaintiff sprang down the stairs, seized a bot stick and a piece of clay, and put it on the bot stick, and, just as he was about to apply it to the tap hole, the metal which was oozing out burst over the stopper then in the tap hole, and flew up and struck him on the body and in the face and eyes, causing intense agony for several months, and absolutely and permanently destroying the sight of both eyes. Plaintiff testified that he was in no danger himself when called; that he could in two steps have gotten behind the furnace, which would have saved him, but that there was a common gangway in front of the tap hole, and a number of men were working in front of it; that he knew the danger to all these men, if the iron which was then oozing out should burst through the defective stopper and fall upon the hard floor; and that he went there to save the lives of the men around there. This testimony was not disputed, nor was the incompetency of the temporary tapper denied, though it was claimed that this incompetency was as well known to the plaintiff as to the defendant; and it was contended that the plaintiff's injury was caused by the negligent and reckless manner in which he attempted to stop the leaking tap hole, and that but for this negligence on his part no accident would have occurred. This defense was properly submitted to the jury by the defendant's fifth and seventh prayers, which were granted; but the jury rendered a verdict for the plaintiff for \$15,000, and from the judgment thereon this appeal was taken. It was also contended at the trial below that as the plaintiff, by his own admission, voluntarily left a position of safety and exposed himself to peril, he was thus guilty of contributory negligence, which must defeat his recovery.

Three exceptions were taken by the defendant in the course of the trial. During the examination of the plaintiff as a witness, his counsel asked him the following question: "State whether or not

there is any danger of injury to people standing or working in the neighborhood of a tap hole, to be feared from the molten metal being allowed to escape, or to continue to escape the way you say it was when you went there to stop it." Defendant objected to this question, but the court overruled the objection, and permitted the question to be asked, and the witness answered: "There was such danger, from the simple fact that as soon as molten iron runs down any stick or hard surface, or anything that is damp, it won't stay there, and it's going to fly. It would have went twenty feet, and burned the people around there; and there was not a man, if it had occurred, that would have escaped out of that corner without being burned, because it would come like a shower of hail right on top of them. It would strike the hard surface, and then fly all over the shop. Every man in the radius of twenty feet would get it, because it don't give any notice when it is coming. It comes in a hurry. I have seen too much of it." To the action of the court in overruling the objection to this question, and in permitting the answer to be received in evidence, the defendant objected, and this constitutes its first exception. The second and third exceptions were taken to the rulings on the prayers, which will be set out in the reporter's statement of the case. The defendant's first and second prayers were offered at the close of plaintiff's testimony, and their rejection at that stage of the case constitutes its second exception. These prayers were renewed, with five other prayers, at the close of all the testimony, and the plaintiff also offered two prayers. The court granted the plaintiff's prayers, and also granted the defendant's fifth and seventh prayers, and rejected its first, second, third, fourth, and sixth prayers, and overruled a special exception taken by the defendant to the plaintiff's first prayer, on the ground that there was no evidence to sustain it; and the defendant's third exception was taken to the granting of plaintiff's prayers, to the rejection of its own first, second, fourth, and sixth prayers, and to the overruling of its special exception to plaintiff's first prayer.

The general principles of law, upon the application of which this case must depend, are well established; but there is involved one question which has never been passed upon by this court, namely, whether one who voluntarily incurs peril, caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is debarred from recovery upon the ground of his own contributory negligence. This question is an interesting one, and has received intelligent and thoughtful consideration in the decisions of other tribunals, by the aid of which we think it will not be difficult to reach a correct conclusion upon the facts of this case. The-

evidence shows that the temporary tapper, Felix, and the plaintiff, Marney, were fellow-servants of the same master, the Maryland Steel Company; that Thomas G. Doyle was foreman of the laborers and riggers in the foundry department; that John P. Hines was foreman of the shop, employed all the men in the shop, and had charge of everybody around the foundry; and that Mr. Sahlin was the superintendent of the Maryland Steel Company, and "was boss over all the bosses and men in the works." In all cases where the relation of master and servant is created by a mere agreement that the servant is to labor for the master at a certain rate of compensation, there arise, by implication, certain reciprocal rights and obligations on the part of each, which the law recognizes as fully as if expressed in the agreement. Bailey, in his work on Master's Liability for Injuries to Servant, states the chief of these implied obligations as follows: First, that he will provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to his employment will permit; second, that he will provide a suitable and reasonably safe place for the doing of the work to be performed by the servant; and, third, that he will provide, when required by the nature of the work, other servants reasonably skilful and competent for the performance of their particular work, so that the servant may not be exposed to unnecessary risk or peril from unskilful or incompetent fellow-servants. In the performance of these and all other similar duties, the master is not a guarantor against the negligence of his servants, and is bound only to the exercise of reasonable and ordinary care. Every servant entering into the employment of a master takes upon himself the risk of injury from the negligence of his fellow-servants, and for such negligence the master cannot be held liable, unless he himself has been guilty of negligence in the selection of the servant whose carelessness caused the accident, or unless, knowing his incompetency, or having sufficient opportunity to know it and failing to discover it, he has retained the negligent employee in his service. *Mayor, etc., v. War*, 77 Md. 597, 27 Atl. Rep. 85. And in this case, as in the case just cited, the declaration is framed upon a distinct recognition of these undisputed principles. In order, therefore, to recover for the terrible injuries which the plaintiff has received in the service of the defendant, it is necessary for him to establish by legally sufficient evidence.—First, that the accident was the direct result of the negligence or incompetency of the tapper, Felix; secondly, that the defendant, prior to the employment of Felix as tapper on that special occasion, had knowledge of his incompetency, or that after his employment, and before the accident, the defendant

discovered his incompetency, but nevertheless retained the incompetent servant; and, thirdly, it must not appear from the evidence that he has himself been guilty of any negligence directly contributing to produce his injuries.

The evidence of the gross incompetency of Felix as a tapper, as well as of the full knowledge by the defendant of such incompetency before his employment on the day of the accident, and of its demonstration anew to the defendant on that day, and before the accident, is undisputed and overwhelming. Johnson, one of the molders employed by defendant, testified that he had known Felix over a year; "that he appeared to be of a very nervous disposition at that character of work, and, judging from my knowledge of the foundry, I should not judge him to be a man competent for the position; he wasn't acquainted with the principles I have seen experienced men adopt for that character of work." And again he says: "If he is timid of the hot iron, he is fearful of doing his duty; he wants to get away from it as soon as he can; and, if he is an incompetent man, he will leave it, whether it is secured or not, because he is not aware of the fact." Hines, another molder by trade, who had been with the Maryland Steel Company five or six years, and who was foreman of the shop at the time of the accident, testified: That Felix had been previously employed there as a tapper, but had got burnt a couple of times. "That he was afraid to tap, — afraid he would burn himself and the other men. He would run away and let it go, if it got the best of him. That the men around the cupola said he could not do the work right, so I took him away and put another man in his place. He was not competent, but I had to put him there this day, because the regular cupola man was off at a funeral." He also testified that Mr. Sahlin, the general superintendent, saw Felix tapping nearly every day when first employed, and saw him running away when the iron bounced over the top of the runner, and that Sahlin told him to put another man in his place, and he did so; that on the day of, and before, the accident, Sahlin was standing in front of the cupola while Felix was tapping, and said, "This man will burn himself and the other men," but did not say anything about turning him off. He also testified that Sahlin knew he (Hines) knew nothing of tapping, but that Sahlin insisted upon his taking the position of foreman, and charged him with the duty of employing the men for all the work, though he objected to doing so, and only took it temporarily, till they could get some one else. It does not appear that Marney knew before the accident of the incompetency of Felix, but he testified that he observed him tapping on that day, and, "seeing there was a little

something the matter with him," he stopped the tap hole for him at that time. He also testified that the stopper which was leaking when he was injured was a very light and insecure one, and that it is the duty of a man, when he leaves it for any considerable length of time, as it was shown Felix did on that occasion, to secure it, and that it was criminal to leave a stopper that way, because that was a gangway with men working all round there.

These extracts from the testimony establish beyond all question the gross incompetency of Felix for his work, and the full and continuous knowledge of this incompetency by the defendant, thus charging it with flagrant negligence in his selection for such work. But it still remains to be shown that the accident was the direct result of the incompetency of Felix; and of this we have no doubt, though it was strenuously contended by the appellant's counsel that the cause of the accident was not the negligence of defendant in supplying an incompetent fellow-workman, nor the negligence of Felix in not properly securing the tap hole, but that it was the action of Marney himself in attempting to prevent the consequences of the negligence of Felix by stopping the tap hole himself; and this requires some consideration of the doctrine of proximate and remote cause. In discussing this subject, Mr. Bailey, in his work on Master's Liability, says on page 418: "It is perhaps well to call attention to the fact that 'proximate cause' does not mean the direct cause in point of time, but may mean the nearest by relation; that 'remote cause' does not mean remote in point of time, but merely in its connection with the primary cause. To illustrate: A farmer along the line of a railroad may open the fence maintained by the company, for temporary purposes, and while so left open his cattle may stray upon the company's track, and receive injury by coming in contact with the company's trains, without any fault being chargeable to its servants in charge. The direct cause of such injury would be the collision. The remote cause in point of time would be the act of the farmer in leaving the fence open. The remote cause in point of time becomes the proximate cause in producing the injury. We go back of the direct cause to find a negligent act which made the collision and injury probable, without which the accident and injury would not have occurred, and we charge such an act with the responsibility for the injury." This method of reasoning is in harmony with that of this court in *Railroad Co. v. Reaney*, 42 Md. 130, where Judge Alvey says: "In the application of the maxim, '*In jure non remota causa, sed proxima, spectatur*,' there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of

rational justice. Courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. It is certainly true that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong, and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done. The principle is well settled that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrongdoer." The case of *Gibney v. State*, 137 N. Y. 1, 33 N. E. Rep. 142, is a recent practical application of the principles stated in 42 Md. Plaintiff, with her husband and infant son, were crossing a bridge over the Erie canal. The child fell through an opening in the railing of the bridge, which was left unguarded, into the canal. The father plunged into the canal to rescue the child, and both were drowned. It was held "that, while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the State in leaving the bridge in a dangerous condition." The principle of these decisions seems to us to be quite decisive of the view that the negligence of Felix was the proximate and efficient cause of the accident which produced the plaintiff's injuries. Adopting the reasoning and language of Mr. Bailey, cited above, we go back of the direct cause (in this case, the interposition of Marney to save life) to find a negligent act (in this case, the deliberate employment by the defendant

of a servant known to be grossly incompetent) which made an accident probable, without which the accident and injury would not have occurred, and we charge that act with the responsibility for the injury.

But it is further contended that, even if the proximate cause is thus correctly ascertained, the plaintiff has been guilty of such concurring negligence as must defeat his recovery, and this is claimed upon two distinct grounds: First, that his leaving his position of safety, even to save life, was in itself fatal to his recovery; and, second, that, if this be not correct, the use of a wet bot stick and wet clay by an experienced tapper constituted gross negligence on his part. There can be no doubt that actual negligence by the plaintiff in the manner of his interposition should defeat his recovery, and this defense was therefore properly submitted to the jury, on the testimony of Doyle and Dr. Woodward, by the defendant's fifth and seventh prayers, which were granted, but the jury found by their verdict that plaintiff was free from actual negligence. It only remains, therefore, to consider whether plaintiff's interposition, without actual negligence, in order to save life, constitutes negligence *per se*; and we are of opinion that it does not. This is the doctrine of the text writers. Pierce, in his work on Railroads (page 328), says: "The fact that the injured person did some act by which he incurred or increased danger does not necessarily involve negligence which will prevent recovery, where the danger was created by some wrongful act of the company. The question is for the jury, whether he acted from wrongheadedness, or as a prudent man would have done under the circumstances." Beach, in his work on Contributory Negligence (sec. 42), speaking of the conduct of persons who are themselves exposed to sudden danger, says, "When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril or in danger of great bodily harm, such exposure and risk for such purpose is not negligence." It was so held in *Eckert v. Railroad Co.*, 43 N. Y. 502, where Eckert, in the effort to save a child from being negligently run over by one of defendant's trains, lost his life, without actual negligence on his part; and Judge Grover said: "It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an effort to do so, although believing he might possibly fail and receive an injury himself. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under

such circumstances as to constitute rashness, in the judgment of prudent persons." It was so held in Ohio in *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. Rep. 172, where the reporter, paraphrasing the opinion of the court in the headnote, states it thus: "In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributable to the party that negligently or wrongfully exposed to danger the person who required assistance." Eckert's Case was recently approved, in a strong and clear opinion, in *Gibney v. State*, 137 N. Y. 1, 33 N. E. Rep. 142, and it has been followed by the courts of last resort in a number of the States: In *Linnehan v. Sampson*, 126 Mass. 506, where the court said: "The law does not require cowardice or inaction in such a state of things, and it does not follow, as matter of law, that in encountering the danger he was necessarily guilty of a want of due and reasonable care." So, in *Pennsylvania Co. v. Roney*, 89 Ind. 453, where an engineer refused to leave his post, and went to his death in the discharge a duty of cast upon him. So, also, in *Donahoe v. Railway Co.*, 83 Mo. 563; in *Condiff v. Railroad Co.*, 45 Kan. 260, 25 Pac. Rep. 562; in *Cottrill v. Railway Co.*, 47 Wis. 634, 3 N. W. Rep. 376; and in *Peyton v. Railway Co.*, 41 La. Ann. 862, 6 Southern Rep. 690. These views are in accord with our own. The plaintiff in this case, though moving in a humble sphere, has given an example of genuine and heroic manhood, and has demonstrated that in his estimation "the duties of life are more than life."

The plaintiff's first prayer requires the jury to find that the defendant knowingly employed and retained an incompetent servant; that this servant, by reason of his incompetency, brought about the sudden and imminent danger of the explosion which actually occurred; that the plaintiff interposed to avert this danger, and in so doing employed the usual and ordinary methods for that purpose, and exercised such care as a reasonably prudent man could be expected to exercise under such circumstances; and there was abundant evidence to sustain the theory of the prayer. In framing it, the defendant was not a "forgotten man;" nor, in granting it, did the court permit the plaintiff to be generous at the expense of the defendant; for the prayer required the jury to find a default on the part of the defendant, which originated the danger, and continued in operation until the moment of the accident. It follows from what we have said that there was no error in granting this prayer, nor in overruling the special exception thereto, which was, in any event, defective in failing to specify in what respect the evidence was alleged to be insufficient to support the prayer.

The plaintiff's second prayer correctly stated the rule of damages applicable to the case. Without the evidence objected to in the first exception, the plaintiff could not have laid the foundation for his defense, and there was no error in its admission.

The defendant's first, second, third, and fourth prayers are all based upon the erroneous view that the interposition of the plaintiff, under the circumstances, was negligence *per se*, and they were therefore properly rejected. The fourth prayer was open to the further objection that it ignored the evidence that plaintiff was to stop the cupola when called, and that he was called by Strickler, and also by Doyle, who was his superior in authority, and had the right to direct him.

The defendant's sixth prayer might be disposed of on the same ground as the others, since, even if plaintiff had known of Felix's incompetency, this would not make his interposition to save life negligence *per se*; but, apart from this consideration, it would have been erroneous to say that the undisputed evidence showed that plaintiff had the knowledge, when there was in fact no positive testimony on this point. Finding no error in any of the rulings, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

BOYLAN V. EVERETT ET AL.

Supreme Judicial Court, Massachusetts, January, 1899.

INJURY FROM BITE OF DOG. — One who permits a dog on his premises, occasionally feeding and petting it, and calling and commanding its obedience, cannot be said as matter of law to be its keeper (1).

KEEPER OF DOG. — A dog kept upon premises by the owner's nephew, with his consent, is not conclusive proof that the owner of the place was the keeper of the dog.

FROM a verdict rendered for defendants in Superior Court, Norfolk County, plaintiff brings exceptions.

This was an action of tort to recover damages for injury caused by the bite of a dog which was not owned by defendants, but was

1. For actions arising out of personal injuries inflicted by DOGS, see 1 AM. NEG. CAS. 58-262 and by other ANIMALS, 1 AM. NEG. CAS. 1-436, in which volume the cases are classified according to date, from the earliest

period to 1895, and arranged in alphabetical order of states. For subsequent actions on the same topic, see vols. 1-4, AM. NEG. REP. and the current numbers of that series.

the property of their nephew, who boarded with defendants. In the Superior Court the plaintiff asked the court to rule. First. That on the facts the only question for the jury was as to damages. Second. That "the keeper of a dog is one who harbors it, exercises control over it, although to be a keeper of a dog it is not necessary that one should have the whole or entire control of it, and there may be several keepers of the same dog;" and that "where a person allows a dog to be on his premises, occasionally feeding and petting it, sometimes calling and commanding its obedience, or simply permitting the dog to be one of the family, he is then the keeper of the dog, and becomes liable for damages caused by it." Third. "It is for the jury to say whether they believe the plaintiff has shown by a fair preponderance of all the evidence that the defendants had some control and custody over the dog. If they did, they are responsible for him as keepers." Fourth. "If the dog belonged to defendants' nephew, and he kept it on the defendants' premises with their consent, and they did anything to maintain or keep him, gave him food, or protected him, or provided for him in any way, they would be, in the sense of the law, keepers of the dog." The court refused to give the rulings as requested. The jury found for defendants, and plaintiff excepted.

T. E. GROVER and J. HEWINS, for plaintiff.

P. H. COONEY, for defendants.

LATHROP, J. — The bill of exceptions in this case does not state that it contains all of the evidence material to the issue involved, and the question whether the defendants were the keepers of the dog, within Pub. St. c. 102, sec. 93, was a question of fact for the jury. *Barrett v. Railroad Co.*, 3 Allen, 101 (1); *Collingill v. City of Haverhill*, 128 Mass. 218 (2); *McLaughlin v. Kemp*, 152 Mass. 7, 25 N. E. Rep. 18; *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. Rep. 875 (3); *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. Rep. 745. The first instruction requested was, therefore, rightly refused.

The first part of the second instruction requested was given in substance. We do not think that the judge was required to give the last part of this request, as matter of law. "The mere fact that a dog is kept by its owner on the premises of another, with the knowledge or acquiescence or permission of the owner of such premises, does not of itself make the owner of said premises the

1. *Barrett v. Malden, etc., R. R. Co.*, 3 Allen (Mass.) 101, is reported in 1 Am. Neg. Cas. 141.

2. *Collingill v. City of Haverhill*, 128 Mass. 218, is reported in 1 Am. Neg. Cas. 142.

3. *Whittemore v. Thomas*, 153 Mass. 347, is reported in 1 Am. Neg. Cas. 142.

keeper of the dog." *Whittemore v. Thomas, ubi supra.* Nor can we say that the facts that the defendants fed and caressed the dog, called it in and sent it out, and that it was treated "the same as anybody would that had a dog at their home," which is the testimony of the defendants, and which we assume to be the meaning of the last part of the second request, required the judge to rule, as matter of law, that the defendants were, therefore, the keepers of the dog, irrespective of the fact that the dog belonged to their nephew, who was a boarder with them.

As to the third request, we do not think that if the defendants exercised some control over, and had some custody of, the dog, it therefore followed that the plaintiff was entitled to a ruling, as matter of law, that the defendants were responsible for him as keepers.

We are further of opinion that the judge was not bound, as matter of law, to give the fourth ruling requested. While the acts recited may be evidence of keepership, more or less significant, according to the other facts appearing in the case, it cannot be said that they are conclusive.

The exception taken to the charge is only so far as it is inconsistent with the requests made. It seems to us that the requests were rightly refused, and that the case was properly submitted to the jury on the evidence.

Exceptions overruled.

O'BRIEN v. CITY OF WORCESTER.

Supreme Judicial Court, Massachusetts, January, 1899.

MUNICIPAL CORPORATIONS — SEWERS — INJURY TO PREMISES. —

Where plaintiffs' premises were connected with an old sewer which was walled up by defendant after a new sewer had been built, but before plaintiffs' premises were connected with it, the defendant was liable for resulting damages unless there was contributory negligence upon the part of the plaintiffs.

CONTRIBUTORY NEGLIGENCE — FAILURE TO CONNECT PREMISES

WITH SEWER. — If the plaintiffs knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built, and that the old sewer was walled up, and negligently omitted to connect their premises with the new sewer, or failed to take such measures of prevention and precaution as ordinary prudence would have required, they cannot recover for any damages to which such negligence contributed.

EXCEPTIONS from Superior Court, Worcester County. Plaintiffs bring exceptions from judgment rendered on verdict in their favor.

WOOD & WOOD, for plaintiffs.

A. P. RUGG, City Solicitor, for defendant.

MORTON, J. — The defendant was under no legal obligation to the plaintiffs to build or maintain a sewer in Bradley street. It had a right to discontinue the old sewer, and to build a new one, and it was not required to connect the premises of the plaintiffs with the new sewer. Under the regulations of the board of health, which are said in the defendant's exceptions to have been duly adopted in accordance with authority conferred on the defendant by law, it belonged to the plaintiffs to do that. But in discontinuing the old sewer the defendant was bound to proceed with due regard to the fact that the premises of the plaintiffs were connected with and drained into it; and, if it failed to do so, it was liable to the plaintiffs for the damages resulting to them therefrom, unless there was contributory negligence on their part. It is well settled in this commonwealth that towns and cities are liable for damages caused by their negligence, or that of their servants or agents, in constructing or maintaining sewers, though not for any damages resulting from any defect in the plan or system on which the sewers are built. *Child v. City of Boston*, 4 Allen, 41; *Emery v. City of Lowell*, 104 Mass. 13; *Merrifield v. City of Worcester*, 110 Mass. 221; *Bates v. Inhabitants of Westborough*, 151 Mass. 174, 23 N. E. Rep. 1070; *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. Rep. 519. There was testimony tending to show that "some time after the new sewer was constructed the city walled up the old sewer without the knowledge of the plaintiffs, and without notice to them," and that the effect of this was to cause the water and sewage to set back into the cellar of the plaintiffs, and lead to the damages and injuries complained of. The city had no right to do this without taking reasonable precautions to see that the plaintiffs were not injured thereby. The city contends that the plaintiffs knew, or ought to have known, that a new sewer was being constructed, and that they were negligent in not connecting their premises with it. These were questions of fact for the jury. If the plaintiffs knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built, and that the old sewer was walled up, and negligently omitted to connect their premises with the new sewer, or failed to take such measures of prevention and precaution as ordinary prudence would have required, they cannot recover for any damages to which such negligence contributed. The defendant further contends that the sewer was walled up by its employees without its authority. But each bill of exceptions states that the sewer was walled up by the city. The defendant also insists that the plaintiffs violated the

rules of the board of health in not entering the new sewer, and for that reason cannot recover. But no rule of the board of health required them, so far as appears, to enter the new sewer. When the old sewer was constructed, the predecessors in title of the plaintiffs entered it, and the premises continued to be connected with it till the plaintiffs discovered, as they claimed, that it had been walled up, and a new sewer had been built, when they entered the new sewer.

The remaining questions relate to damages. The court ruled that the action could be maintained, but ruled also, in effect, that the plaintiffs could only recover as damages the reasonable expense of connecting their estate with the new sewer, which was agreed to be \$100, and a verdict for the plaintiffs was rendered for that amount. We think that this was error. If the plaintiffs were entitled to recover at all, they were entitled to recover all the damages to their estate that were the natural and proximate results of the act complained of, and such as reasonably might be supposed to have been within the contemplation of the parties, if at the time of the doing of the act they had taken thought of the consequences likely to ensue. *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. Rep. 1015. Applying the rule thus laid down, we think that the plaintiffs were entitled to recover for injury to the real estate, including loss of rents and reasonable compensation for their trouble and expense in respect to their property, unless and except to the extent to which, by reasonable care and precaution, they could have guarded against such injury. See *French v. Lumber Co.*, 145 Mass. 261, 14 N. E. Rep. 113. We do not think that the plaintiffs were entitled to recover the expense of connecting their premises with the new sewer. As already observed, it belonged to the plaintiffs to make the connection. We do not see how the fact, if it was a fact, that the defendant, as against the plaintiffs, may have walled up the old sewer wrongfully, relieved the plaintiffs from the expense of entering the new sewer, and cast it upon the defendant. This is a joint action by the plaintiffs, as owners of the real estate, and we do not see how they can recover in this action for injuries to their health. The result is that in each case the exceptions must be sustained, and it is so ordered.

Exceptions sustained.

LANG v. H. W. WILLIAMS TRANSPORTATION LINE.

Supreme Court, Michigan, December, 1898.

MASTER AND SERVANT — STEAMBOAT AFTER BEING TIED UP FOR WINTER TAKING FIRE IN NIGHT-TIME AND EMPLOYEE BURNED TO DEATH. — Where a steamer was tied up to the dock of defendant for the winter, and after the fires under the boilers had been put out, and the captain's crew had left the boat, and also the watchman, leaving only those on board who were getting the boat ready for the winter, and the only fire being that in a pony engine used for heating the cabins, and in kerosene lamps used for lighting, and the boat took fire during the night, and an employee was burned to death, the owners were not negligent in failing to keep a watchman on board.

ASSUMPTION OF RISK. — Though it was not shown that the deceased knew that the captain's crew had left the boat, the fact that they had all lived in a common room and the rest of the crew knew it, and the boat was left in their charge, and deceased was in charge part of the time of the pony engine, and knew that the boat was lighted by kerosene lamps, he assumed the risk of staying on board without a watchman.

ERROR to Circuit Court, Van Buren County. There was a judgment for plaintiff and defendant brings error.

T. J. O'BRIEN and JAMES H. CAMPBELL (WILLIAM H. CONDON, of counsel), for appellant.

GORE & HARVEY, for appellee.

MOORE, J. — This suit was commenced to recover damages on account of the death of Joseph M. Lang, who was in the employ of the defendant upon the steamer City of Kalamazoo, as one of her crew. This steamer was partly burned in November, 1896. Mr. Lang lost his life in the fire. The plaintiff recovered a judgment in the court below, from which judgment defendant has appealed. Nearly all the assignments of error relate to the charge of the court as given, or to the refusal of the judge to grant defendant's requests. If there was any case at all to be submitted to the jury, it was fairly submitted by the trial court. In our view of the case, the only question open for discussion is, did the plaintiff make a case which entitled her to recover?

There is not much conflict of testimony in relation to the important questions of fact. The record discloses that during the season of 1896 the City of Kalamazoo, a passenger and freight steamer, was navigating Lake Michigan. Her home port was South Haven. Mr. Lang was a member of the engineer's crew all the

season, — first as a fireman, and then as oiler. In the winter he lived on a small farm, and for several summers he was a sailor. On the 22d day of November, 1896, the steamer was brought to South Haven, to be laid up for the winter. The crew consisted of sixteen persons. Six of them, including two watchmen, were known as the "captain's crew." There were five persons in the cabin crew. Five persons, including Mr. Lang, constituted the engineer's crew. After entering the port, the steamer was tied up to the dock of the defendant, where she was to remain during the winter. The work of preparing her was at once commenced. It was the duty of the captain's crew to gather up the floats, life preservers, lines, chains, and other things of that character, and prepare the life boats and rafts for the winter; it was the duty of the engineer's crew to prepare the engine and boiler for the winter; while the cabin crew removed the bunks, beds, and furniture, and cleaned the cabin. The work of the captain's crew was finished first. On Friday, the 27th day of November, the members of this crew were paid off, and left the boat. The day before this the fires under the boiler had been put out, and the water removed from the boilers. The other crews had not completed their work. There was a small upright pony boiler on the main deck. After the fires were drawn from the large boiler, this small boiler was used to warm the cabins by means of two radiators. It was in charge of the engineers and oiler. The lights used in the evening were four to six ordinary kerosene oil lamps. There was a fire in the pony boiler during Sunday, and for at least a portion of Sunday evening it was in charge of Mr. Lang. Nearly all the members of the crews remaining on the boat, including Mr. Lang, continued to sleep and eat upon the boat. Previous to leaving the boat, the captain testified, he went to the engineers, and told them he had got through with his crew, and he and they were about to leave the boat, and that whatever duties there were in the boat the engineers must look after. No watchman was kept after the captain and his crew left. About three o'clock Monday morning the boat was discovered to be on fire. When the fire was put out Mr. Lang was found about eighteen feet from his berth, dead. It is claimed on the part of the plaintiff, that, as long as part of the crew were sleeping upon the boat, it was negligence not to keep a watchman, and that, if a watchman had been kept, Mr. Lang would not have lost his life. It is a somewhat significant fact that notwithstanding our vast inland seas have been navigated for many years by hundreds of vessels, employing thousands of men, the industry of counsel has not enabled them to call the attention of the court to a case involving the question as to whether, under such circumstances

as disclosed by this record, the owner of the vessel is liable. There is no claim the steamer was in a hazardous place. She was not at this time carrying passengers. There was no steam in her boiler, and no fire in her furnaces. What oil she carried was in an iron-lined oil room, which was undisturbed by the fire. The pony boiler was not larger than the boiler used for heating purposes in an ordinary modern dwelling. The steamer was not in motion so that oil lamps were likely to be thrown from their places. No more lamps were used than are usually used in an ordinary dwelling by a family of usual size. It was not shown that it was customary to keep watchmen after the captain's crew left the boat. Such evidence of custom as was introduced tended to show that watchmen were not kept under the circumstances disclosed by the record. It is true, nine persons slept upon the steamer, but that is not more than is frequently to be found in dwellings. Section 4477, Rev. St. U. S., provides that every steamer, carrying passengers during the night, shall keep a suitable number of watchmen to guard against disasters and give alarms, but no such duty is imposed by statute in cases like the one at issue. Was there any such negligence at the common law as to create liability upon the part of the owners? In *Railroad Co. v. Coleman*, 28 Mich. 440, it is said negligence is nothing more nor less than a failure of duty. In another case it is said negligence consists in a want of that reasonable care which should be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. *Railroad Co. v. Van Steinburg*, 17 Mich. 119. Would a man of ordinary prudence, under the existing circumstances, anticipate any danger of injury to any of the crew because of the absence of a watchman? The cook, the engineers, and other members of the crew, knew that after Thursday night the watchmen were not there, but they did not regard their absence as such a source of danger as to prevent them from sleeping upon the steamer. We do not think it can be said there was a want of reasonable care upon the part of the owner in not keeping a watchman after Thursday night, but, if this could be said, we think there is a difficulty in the way of plaintiff's obtaining judgment.

As already stated, before the crew of the captain was withdrawn the engineers were informed that the crew, including the watchmen, were to leave the boat, and that it must be looked after by the engineer and his crew. It is urged upon the part of the plaintiff that this notice was not brought home to Mr. Lang, and that the master cannot avoid responsibility by delegating his duty to another; citing *Car Co. v. Laack* (Ill. Sup.), 32 N. E. Rep. 285. An inspection

of this case shows that no notice of the changed condition was given, either to the plaintiff or to the gang of men with whom he worked, and there was no opportunity for him to know of the changed condition until the accident occurred. In disposing of the case the court uses the following language: "If, by reason of the omission to supply the usual and ordinary means to prevent accident, the hazard to its servants was increased, and the change in appliances was not known to the servants, or so open and visible that they by the exercise of ordinary care would see and know of it, the legal duty rested upon the master to notify them of the increased danger to which they were exposed; and, it being a duty owed by the master to the servant, it could not delegate it to another, even though a fellow servant of appellee, and absolve itself from liability for the injury resulting in consequence of the failure to communicate knowledge to appellee of the increased hazard." It is true, the record does not show the captain informed Mr. Lang that he and the watchmen were going to leave; but was not their absence so open and visible that Mr. Lang, by the exercise of ordinary care, would know this crew of six men were no longer upon the boat? The other members of the crew, who were witnesses, knew the captain and his crew had left the boat. The cook testified those remaining on the boat knew the captain and his crew were gone. Does any one believe that six out of sixteen persons employed upon a small boat like this could leave the employment for the season, without the remainder of the crew knowing it? The men all got their meals in a common dining room. Their work was all upon a comparatively small steamer, where all, or nearly all, of them stayed nights. It is too improbable to believe that Mr. Lang did not know the captain and his crew left the boat Friday afternoon, and that after that date he knew the steamer was without a watchman. He was not unfamiliar with the life of a sailor. He had sailed for a number of years. He was not unfamiliar with this steamer. He had been with it through the season. He was not unfamiliar with the pony boiler. He was in charge of it for at least a part of the day before his death. Nor was he unfamiliar with the method of lighting the steamer. If the situation was a dangerous one, Mr. Lang was as familiar with the danger as any one. He was under no obligations to remain upon the boat, if by doing so he incurred a danger. It is evident that neither he nor the other members of the crew believed they were incurring any danger by remaining on board the vessel. If, by sleeping upon the steamer, Mr. Lang incurred a risk, he, being fully advised of the circumstances, must be regarded as assuming the risk. *Soderstrom v. Lumber Co.* (Mich.), 72 N.

W. Rep. 13; Hayball *v.* Railway Co., Id. 145, and cases cited therein; Jacobs *v.* Railway Co., 84 Mich. 299, 47 N. W. Rep. 669; Ragon *v.* Railway Co., 97 Mich. 265, 56 N. W. Rep. 612.

We think the court should have directed a verdict in favor of defendant. Judgment is reversed, and no new trial ordered. The other justices concurred.

ISAACKSON *v.* DULUTH STREET RAILWAY COMPANY.

Supreme Court, Minnesota, December, 1898.

PERSON INJURED BY ELECTRIC CAR — RULE OF COMPANY REQUIRING MOTORMAN TO EXERCISE GREATER CARE THAN LAW REQUIRES. — The plaintiff sued for personal injuries received while on defendant's track in a public street, and, against defendant's objection, introduced in evidence a special rule of the defendant street-railway company intended for the guidance of its motorman, which provided that "he must keep a sharp lookout to avoid running into pedestrians and vehicles, especially at cross streets. While the car is in motion, the responsibility for safe running rests with him. * * * He will be held responsible for any damage arising from negligence." Plaintiff did not know of the existence of this rule, nor was there any evidence showing how long it had existed. *Held* error, — that the rule imposed a higher degree of care on the motoneer than the law required, that the jury might have understood that this rule imposed upon him and the defendant an extraordinary degree of care as to travelers on defendant's track, whereas the law imposes only a reasonable degree of care and vigilance in such cases.

Held, also, that there was sufficient evidence to justify the trial court in permitting the question of the defendant's negligence and the plaintiff's contributory negligence to go to the jury.

(Syllabus by the Court.)

APPEAL by defendant from the order of the District Court of St. Louis County, denying a motion for judgment notwithstanding the verdict, or for a new trial.

THOMAS S. WOOD, for appellant.

JOHN JENSWOLD, JR., for respondent.

The facts and points decided are stated in the syllabus by the court.

Order reversed and new trial granted.

Opinion by BUCK, J.

McGRATH v. EASTERN RAILWAY COMPANY OF MINNESOTA.

Supreme Court, Minnesota, December, 1898.

INJURED BY OBJECT THROWN FROM RAILROAD TRAIN — CUSTOM.

— Plaintiff, while standing on a platform beside a railroad track, was struck and injured by a bundle thrown from a rapidly moving train by a news agent, who was not a servant of the railway company. It had for a long time been the practice to throw newspapers off at this point, and in a few instances heavier bundles were thrown off; but the place had but few inhabitants, was in a thinly-settled portion of the state, and it does not appear by the evidence that people were in the habit of congregating on this platform when the trains passed by. In an action against the railway company for damages for this injury, it was held that the evidence did not show that the practice was dangerous, and would not sustain a verdict for plaintiff (1).

(Syllabus by the Court.)

1. See *Southern R'y Co. v. Rhodes* (*U. S. Circuit Appeals, April, 1898*), 4 Am. Neg. Rep. 733, where it appeared that a passenger on platform of station was injured by mail pouch thrown from moving train.

See also the following cases:

In *Snow v. Fitchburg R. Co.*, 136 Mass. 552, it was held that a passenger who while waiting in a proper place, and using due care on the platform at a railroad station, was injured by being struck by a mail bag thrown in accordance with a custom known to the corporation by a mail agent in the employ of the United States from an express train, might maintain an action against the corporation.

In *Walton v. N. Y. Central Sleeping Car Co.*, 139 Mass. 556, it was held that the sleeping car company owning the car in use on the railroad under an agreement between it and the railroad corporation, was not liable for an injury caused to a person not a passenger by the porter of the car who was in its employ, throwing from the car a bundle, containing his soiled clothing and other personal property, solely for his own convenience, where it was shown

that the act was the only one of its kind and was not within the scope of the porter's employment.

In *Walker v. Hannibal & St. J. R. Co.*, 121 Mo. 575, it appeared that plaintiff was foreman of a lime company and had been in the habit of sending iron drills some distance to be sharpened; that the drills for years had been returned by the baggageman on the train of the defendant unknown to it; that as the train passed the point nearest the lime company's premises the baggageman would throw the drills off, and on the occasion in question when thrown off they struck the plaintiff and injured him. The plaintiff was well acquainted with the practice. The court held that the railroad company was not responsible for the act of the baggageman that was not done in the scope of his employment and of which it had no notice.

The foregoing three cases are reviewed in *Fletcher v. Balt. & P. R. Co.*, 168 U. S. 135, where it appeared that a railroad employee, after finishing his day's work and leaving the grounds of the company, was injured while moving along a highway by the

APPEAL from District Court, Ramsey County. There was a verdict ordered for defendant, and from an order denying a new trial plaintiff appealed.

HENRY and **R. L. JOHNS** and **J. C. NETHAWAY**, for appellant.

C. WELLINGTON, for respondent.

CANTY, J. — Mansfield is a stopping place on the railroad of the defendant, and was used mainly as the point at which to deliver supplies for a logging camp in the woods, and had but few inhabitants. A passenger train known as the "Limited" ran through the place every day, at a high rate of speed, without stopping. Plaintiff was employed in receiving supplies and sending them to the camp, and on the day in question was standing on the platform when the train passed by. A bundle of pamphlets and periodicals, weighing about fourteen pounds, thrown out of the baggage car, struck him on the leg, broke it, and otherwise injured him. This action was brought to recover damages for the injury. On the trial the court ordered a verdict for defendant, and from an order denying a new trial the plaintiff appeals.

The package was thrown off by one Cole, a news agent on the train. He received the package from one Bergen at Princeton, another station on the road, and was requested by Bergen to take the package to Mansfield, and deliver it there. Taking the package to Mansfield, and delivering it there, was wholly outside the line of the business of Cole as news agent, and seems to have been done to save the express or freight charge. By the terms of the contract between defendant and Cole, he was granted the privilege of selling books, newspapers, fruit, cigars and confectionery on its trains. It agreed to carry him and his merchandise on the

side of the railroad track, by the throwing off of firewood from a moving train by employees of the company. It further appeared that such employees were allowed the privilege of bringing back with them, for their personal use, sticks of refuse timber left over from their work after repairing the road. "It was the constant habit of the men, during all these years, to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other persons waiting there for it. The only

caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt anyone in throwing the wood off." The Supreme Court of the United States held that the person so injured did not, at the time of such injury, bear the capacity of a fellow servant of the employees who threw off the wood, and that the existence of a presumptive custom on the subject was sufficient, with evidence of the actual circumstances, to authorize the submission of the question of negligence to the jury, and might be adequate to support a finding of the company's liability in the premises.

trains for that purpose, and he agreed to pay for this privilege a certain sum per year. It was further agreed that he should at all times be under the control and orders of the conductor on the train. Notwithstanding this, Cole was not the servant of defendant, and the doctrine of *respondeat superior* does not apply. But there was some evidence tending to prove that it had been the practice for years to throw bundles off the moving trains at this point; and appellant contends that the jury were warranted, on this evidence, in finding that defendant knew of this practice, and was negligent in failing to stop it. Defendant was not negligent in failing to stop it, unless the practice was dangerous in itself, or the persons engaged in it were careless. The practice of throwing heavy bundles off a moving train onto a platform where people congregate in any considerable numbers is dangerous, and the railroad company may be negligent in permitting such a practice (*Galloway v. Railway Co.*, 56 Minn., 346, 57 N. W. Rep. 1058). But the evidence does not show that people were often on this platform when the train passed. The evidence fails to disclose that more than one or two people were usually in or about Mansfield when the limited passed through the place. Again, most of the packages thrown off the train were bundles of daily newspapers, containing from one to six newspapers in a bundle, which would not be likely to do much injury by striking a person. In a few instances during the five or six years before the injury heavier bundles were thrown off. This evidence would not warrant the jury in finding that the alleged practice was dangerous. This is the only question raised having any merit, and the order appealed from is affirmed.

BARRETT V. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, Minnesota, December, 1898.

EMPLOYEE OF RAILROAD INJURED BY BEING RUN OVER WHILE SWITCHING CARS. — The end of one of the rails in defendant's side track was battered down, spread out, and split or splintered so that it projected inward five-eighths of an inch for a distance of three inches along the rail. Plaintiff, an employee of the defendant, attempted to couple the pilot bar of an engine to a freight car, but failed to do so; and in attempting to step backward off the side track, out of the way of the slowly-moving engine, the leg of his pants was caught near the heel by said projection, and his leg was held and crushed by the wheel of the engine. *Held,*

defendant was not guilty of negligence in permitting this slight projection to remain on the rail.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Wright County, dismissing action.

F. E. LATHAM, for appellant.

W. E. DODGE, for respondent.

The facts and points decided appear in the syllabus.

Judgment affirmed.

Opinion by CANTY, J.

BENSON V. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

Supreme Court, Minnesota, January, 1899.

"CARS" IN STATUTE MAKING COMPANY LIABLE FOR INJURY TO EMPLOYEES INCLUDE HAND CARS. — Laws Wis. 1893, c. 220, provides that "every railroad or railway company operating any railroad * * * within this state shall be liable for damages sustained within the state, by an employee of such company without negligence on his part * * * while such employee is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines or cars and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company." *Held*, that the words "or other * * * cars" include hand cars.

(Syllabus by the Court.)

FROM an order of District Court, Hennepin County, sustaining a demurrer to complaint, plaintiff appeals.

ARCTANDER & ARCTANDER, for appellant.

L. K. LUSE (THOMAS WILSON, of counsel), for respondent.

This action was brought to recover damages for personal injuries sustained in the State of Wisconsin while the plaintiff, in the performance of his duty as an employee of the defendant, was engaged in propelling a hand car over defendant's railway; the injury being caused by the alleged negligence of other employees of the defendant, in carelessly and without notice running another hand car into and against the one which the plaintiff was propelling. The action was brought under Laws Wis. 1893, c. 220, and the only question is whether the facts alleged in the complaint bring the case within the provisions of this statute.

Order reversed.

Opinion by MITCHELL, J.

MILLER V. CITY OF MINNEAPOLIS.

Supreme Court, Minnesota, December, 1898.

MUNICIPAL CORPORATIONS—LIABILITY FOR PERMITTING FIRE HYDRANTS TO BECOME CLOGGED WITH SAND. — *Held*, so far as the city of Minneapolis maintains its water plant for use by its fire department in extinguishing fires, it is performing a public or governmental function, and is not liable for the negligence of its officers and servants in permitting the pipes and hydrants to become clogged and choked with sand, bark, and other refuse.

(Syllabus by the Court.)

FROM a judgment of District Court, Hennepin County, sustaining a demurrer to complaint, plaintiff appeals.

WELCH, HAYNE & HUBACHEK and P. M. BABCOCK, for appellant.
FRANK HEALY, for respondent.

CANTY, J. — The complaint alleges that, while plaintiff's goods were stored in a certain building in Minneapolis, the building took fire, and the fire department responded promptly, and connected their hose and fire engines to the street hydrants in the vicinity, and would have extinguished the fire before any damage occurred to plaintiff's goods, were it not that said hydrants, and the water pipes connecting with the same, were choked and clogged with mud, sand, stones, pieces of bark, and other ingredients, and by reason thereof no water did or could come through the hydrants for nearly an hour after said connection had been made by the fire department, and the mud, sand, bark, and other ingredients choked the engines, and by reason thereof the fire department were powerless and unable to get any supply of water to extinguish the fire, or prevent the spread of it, until plaintiff's goods were burned and destroyed. It is further alleged that the city erected and maintained the water plant, pipes, hydrants, and water service, and charged a compensation to private customers for the use of the same, but it is admitted that the city furnished the same for fire service without compensation, except such as is paid by general taxation. It is further alleged that the city was negligent in permitting the pipes and hydrants to be so choked and clogged, that plaintiff's goods were destroyed as aforesaid by reason of such negligence, and this action is brought to recover damages for the same. The city demurred, on the ground that the complaint does not state a cause of action, and, in our opinion, the demurrer was properly sustained. The city charter permits and authorizes, but does not compel, the city to maintain such

a water plant and service. In maintaining the same for the use of its fire department, the city is performing a public or governmental function, and is not liable for the negligence of its officers or servants in permitting the plant to be out of repair or out of condition for service. *Mendel v. City of Wheeling*, 28 W. Va. 233, and cases cited; *Springfield Fire and Marine Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. Rep. 405. The city is not liable for the negligence of members of the fire department, acting within the scope of their duty (*Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. Rep. 228); and, for the purposes of protection from fire, the water plant and service must be regarded as a part of the fire department.

Order affirmed.

LORANCE v. HILLYER.

Supreme Court, Nebraska, December, 1898.

- ANIMALS TRESPASSING ON CULTIVATED LANDS.** — 1. At common law, every one was bound at his peril to keep his cattle upon his own land, and was liable for injuries committed by them while trespassing upon the lands of others, whether such lands were cultivated or uncultivated (1).
2. So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, or the constitution or laws of this state, is in force here.
 3. The herd law (article 3, c. 2, Comp. St. 1897) was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them.
 4. The object of this herd law was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted.
 5. The remedy afforded by the herd law to one injured by trespassing animals is not an exclusive one.
 6. If the common-law rule has been modified by the herd law at all, the extent of the modification is to limit the liability of the owner of trespassing animals to damages committed by them upon cultivated lands.
 7. A city lot on which are planted fruit trees is cultivated land, within the meaning of section 8 of the herd law.

(Syllabus by the court.)

FROM a judgment of District Court, Gage County, in favor of plaintiff, defendant brings error.

E. O. KRETSINGER, for plaintiff in error.

BUSH & BUSH and L. W. COLBY, for defendant in error.

1. For actions for damage by trespassing cattle, see 1 Am. Neg. Cas. 406-436.

RAGAN, C. — Milo Hillyer, in the district court of Gage county, sued Oliver P. Lorange for damages which he alleged he had sustained by reason of the latter's cow trespassing upon his lot, tearing up the grass and shrubbery, and breaking down and destroying certain cherry trees, growing thereon. Lorange, in addition to a general denial, pleaded, as a defense to such action, that his cow was a well-domesticated Jersey milch cow; that, on the evening or night before the time when it was alleged she had trespassed on the plaintiff's property, he (the defendant) had placed said cow in a good and substantial frame barn, and securely fastened the door thereof, so that said cow could not escape therefrom; that during the night some chicken thieves opened the door of the barn, and turned out said cow; that as soon as he (the defendant) knew that the cow was out he pursued, captured, and returned her to his barn. The district court, on motion of the plaintiff below, struck out of defendant's answer this special matter. On the trial the court instructed the jury that the owner of cattle was liable for all damages done by them upon the cultivated lands of others; and if they found from the evidence that the cow went upon plaintiff's premises, and destroyed or damaged his fruit trees, they should find for the plaintiff. Hillyer had judgment, and Lorange has brought the same here for review on error.

The court did not err in striking out the affirmative matter in the answer nor in giving the instruction it did. The evidence shows that the cow of Lorange went upon the lawn or lot of Hillyer, and injured the grass, shrubbery, and cherry trees growing thereon. Conceding that the cow escaped from her owner and did this damage without any negligence on his part, still we think Lorange is liable. At common law, every one was bound at his peril to keep his cattle upon his own land, and was liable for injuries committed by them while trespassing upon the lands of others. *Star v. Rookesby*, 1 Salk. 335; *Rust v. Low*, 6 Mass. 90; *Ricketts v. Railroad Co.*, 12 Eng. Law & Eq. 520; *McCormick v. Tate*, 20 Ill. 334; *McBride v. Lynd*, 55 Ill. 411 (1); *D'Arcy v. Miller*, 86 Ill. 102 (2); *Birket v. Williams*, 30 Ill. App. 451 (3); *Lyons v. Merrick*, 105 Mass. 71 (4); *Vandergrift v. Rediker*, 22 N. J. Law, 185; *Baker v. Robbins*, 9 Kan. 303 (5). And so much of the common law of England as is

1. *McBride v. Lynd*, 55 Ill. 411, is reported in 1 Am. Neg. Cas. 409.

2. *D'Arcy v. Miller*, 86 Ill. 102, is reported in 1 Am. Neg. Cas. 411.

3. *Birket v. Williams*, 30 Ill. App. 451, is reported in 1 Am. Neg. Cas. 411.

4. *Lyons v. Merrick*, 105 Mass. 71, is reported in 1 Am. Neg. Cas. 304.

5. *Baker v. Robbins*, 9 Kan. 303, is reported in 1 Am. Neg. Cas. 421.

applicable, and not inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is in force here. Comp. St. c. 15.

It seems to be the contention of counsel for plaintiff in error that his client is protected by article 3, c. 2, Comp. St., known as the "Herd Law." The argument is that the cow was not running at large, and that, therefore, her owner is not liable for damages she committed after she escaped, and that the herd law only makes owners of stock liable for damages they commit when running at large. But we are not prepared to adopt this contention. The herd law was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them. The object of that act was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted. But even the remedy afforded by the herd law to one injured by trespassing animals is not an exclusive remedy. *Keith v. Tilford*, 12 Neb. 271, 11 N. W. Rep. 315; *Lafin v. Svoboda*, 37 Neb. 368, 55 N. W. Rep. 1049. At common law, the owner of animals trespassing was liable whether the lands trespassed upon were cultivated or uncultivated, and, if this common-law rule has been modified by the statute at all, the modification limits the owner's liability to trespasses committed by his stock upon cultivated lands. This seems to have been the construction placed upon the act by this court in *Delaney v. Errickson*, 10 Neb. 492, 6 N. W. Rep. 600 (1). But in the case at bar the lawn or lot of Hillyer was cultivated land, within the express language of section eight of the herd law, which declares that "cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedge rows planted on said lands." Cases cited by counsel in support of his contention are *Kinder v. Gillespie*, 63 Ill. 88; *McBride v. Hicklin* (Ind. Sup.), 24 N. E. Rep. 755; *Wolf v. Nicholson* (Ind. App.), 27 N. E. Rep. 505. These cases are not in point. In the case from Illinois, the plaintiff's horses escaped from his inclosure. He immediately went in search of them, but before he found them they were seized by a police constable, who impounded them under the ordinances of the city. But the court held that the horses were not running at large, within the meaning of the ordinance of the city, and therefore the constable had no right to their possession as against the owner. The other two cases cited are similar to the Illinois case.

The judgment of the district court is affirmed.

1. *Delaney v. Errickson*, 10 Neb. 492, is reported in 1 Am. Neg. Cas. 426.

NEWARK ELECTRIC LIGHT AND POWER COMPANY v. MCGILVERY.

Supreme Court, New Jersey, December, 1898.

BROKEN ELECTRIC WIRE IN HIGHWAY INJURING PERSON WHO CAUSED THE BREAK. — A company authorized to place wires in public highways, which wires it uses in its business to transmit an electric current which is dangerous, must exercise a high degree of care to prevent injury to any person using the highways for passage; but to one who, with others, breaks down such wires, and so exposes them, uninsulated and dangerous, it owes no duty except to refrain from wilful acts to his injury, and it will not be responsible for an injury received by him while handling the wires so broken, because it maintained or renewed the current passing over them.
(Syllabus by the Court.)

FROM a judgment of Circuit Court, Essex County, in favor of plaintiff, defendant brings error.

DEPUE & PARKER, for plaintiff in error.

SAMUEL KALISCH, for defendant in error.

MAGIE, CH. J. — This action was brought in the Essex circuit by Sarah McGilvery, the defendant in error, and the widow and administratrix of John McGilvery, deceased, to recover damages from the Newark Electric Light and Power Company, the plaintiff in error, for causing the death of her intestate on July 22, 1895, by its negligence. To a declaration charging negligence, the company pleaded the general issue, and a verdict was rendered in favor of the administratrix, and this writ of error was brought upon the judgment entered on that verdict.

The sole question presented by the assignments of error is whether there was evidence proper to be submitted to the jury upon the issue in the cause. If so, it was not erroneous to refuse to nonsuit, or to direct a verdict for the company, upon which refusals exceptions were sealed.

In deciding this question, we must attribute to the evidence such credibility and force as a jury might. An examination of the evidence shows that the jury might find established the following facts, viz.: That deceased on the day of his death was a lineman in the employ of the Consolidated Traction Company, and engaged, with others of its employees, composing a gang in charge of a foreman, in taking down a "feed wire" belonging to that company from poles in a public street in Newark; that in taking down the feed wire it fell upon and broke a wire of the Electric Light and Power Company, which was strung upon the same poles, and was used to furnish a

current for electric lights, etc.; that the ends of the broken wire lost some part of their insulating cover, and fell to the ground; that the end of it which was nearest the power house of the company was tested, and found to be dead, and was handled where the insulation was off with impunity; that deceased, at the direction of his foreman, immediately afterwards took hold of that end of the wire with his bare hands, and received a shock from an electric current which caused his death within a few minutes. These facts could be found upon direct evidence. From the circumstances proved, the jury might further infer and find that the breaking and exposure of the wire, and its contact with the ground, occasioned the melting of a "fuse" in the power house of the company, whereby the current was cut off from the wire, and it was left "dead;" and that the current was thereafter turned on that wire by the insertion of another fuse by some employee of the company, and thereby the wire became dangerous to any one who, standing upon the ground, should touch it where it had become uninsulated and exposed. It was admitted on the trial that the electric company had authority to stretch wires upon poles in the public street in question, and to use them for conveying the electric current for light, etc. It did not appear to whom the poles belonged, or what rights thereon the electric company and the traction company had acquired.

It is contended for plaintiff in error that upon these facts, which present the case most favorably for the administratrix, the verdict in her favor could not have been rendered, either because they show that deceased contributed to his death by his own negligence, or because they fail to show any negligence on the part of the company which charged it with liability to deceased or to his administratrix. The contention that, upon the facts above stated, the contributory negligence of deceased so clearly appeared that the case should have been taken from the jury, cannot prevail. It is true that deceased, from his experience and observation in his employment, must be deemed to have known the danger of handling a naked wire through which the electric current is running, and he did seize and handle this wire without the precaution of putting on India-rubber gloves. But, if the evidence was believed, he had just seen another person seize and handle the same wire in precisely the same mode, and without any injury. It was therefore plainly a question for the jury to say whether he might not reasonably infer that the wire was innocuous, and whether his act exhibited a want of that reasonable care for his safety which was the measure of his duty. Whether the weight of evidence should have produced a different response to the question cannot be considered on error. On the facts which

the jury might find, they could infer that deceased was not negligent. The contention that, upon the facts, viewed in the light most favorable to the administratrix, the negligence of the company, and its liability therefor to the deceased or to his administratrix, was not made out, presents a much more difficult question. Since liability in such a case arises only from negligence, and negligence in this respect can only be predicated upon the doing of some act by the company which its duty to deceased required it not to do, or in refraining from doing some act which the like duty required it to do, it is obvious that a proper solution of this question requires a preliminary determination as to what duty, under the circumstances, the company owed the deceased.

Two observations may serve, I think, to give a clearer view of the real question thus presented. In the first place, it is plain that the company was in no possible sense responsible to deceased for the fall of the wire. Such companies, using in business wires to carry a subtle and invisible power highly dangerous to life, must, although authorized to stretch such wires along poles in public highways, exercise a very high degree of care for the safety of those who may be thereby exposed to danger. In that regard they owe a duty to every one using the street in the ordinary mode, and if from insufficient support, or from causes which a high degree of precaution would have prevented, the wires fall in the street, and do injury, they are doubtless responsible. But in this case the wire fell, not because of any act or omission of the company, but because deceased and those associated with him broke it down. Whether the breaking was intentionally done, or was produced by negligence or mere accident, the company is in no way responsible to those who broke it for any injury to any of them, at least for any injury which was the direct result of the breaking. In the next place, the death of deceased was not the direct result of the fall of the wire. If the exposed end of the wire had fallen upon deceased while it was still charged with a dangerous current, and by such fall the current was passed through his body to his injury, it would be impossible to find any negligence chargeable to the company. A like result would follow if the wire, after the fall, continued to be charged with the current, and, upon his picking it up, the current was passed through his body to his injury, at least until the company had some notice of the condition of the wire. In each case the injury would be attributable, not to the company, but to those who, by breaking the wire, had made it a cause of injury. But in the case before us the jury might find, as we have seen, that, after the fall of the wire, it became inert and innocuous, and could be and was handled with

impunity. If that be so, the death was the result of the turning on of the current again by the insertion of the new fuse, and the exposure of the wire occasioned by the fall was only the means by which the injury was inflicted.

The real question, therefore, is, what duty devolved on the company, under the circumstances, with respect to the insertion of a new fuse, and thereby renewing the current through this wire? The evidence does not make clear that the melting of the fuse gave notice to the company that the wire was broken and grounded; for the expert evidence is that such melting might be caused by a short circuit resulting from a crossing of the wires as well as by the grounding of a wire. Such melting, therefore, only gave notice that one or the other cause had operated.

To persons unconnected with the breaking of the wire, and using the street in the ordinary mode, I have no doubt the company owed a duty to refrain from sending a current through the wire until it was ascertained that it was safe to do so. But, in my judgment, one who had participated in breaking down the wire cannot charge the company with that duty until he has given it notice of the broken wire and its being grounded. If it could be claimed that, in the absence of proof that this current was carried on wires which might cross, the jury might find that the melting of the fuse gave notice that one of the wires was broken and grounded, a like distinction in the duty devolving on the company exists. As to persons unconnected with the breaking of the wire, and traversing the street in the ordinary way, its duty would be to refrain from turning on a current until it had been ascertained it was safe to do so. But to one who, like deceased, had participated in breaking down and exposing the dangerous wire, and who thereafter intermeddled with it, the company owed no duty except to refrain from wilful acts to their injury. The subsequent handling of the wire, which was exposed by the breaking and fall, was a mere continuation of the act which had broken the wire and caused it to fall. With respect to that wire, the gang of which deceased was one were either trespassers, or, at the most, licensees, and the measure of duty to such is that above stated. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. Rep. 478. The result is that the evidence did not justify the submission to the jury of the question of the company's liability, because it did not show that the company was guilty of breach of a duty which it owed to the deceased.

There should therefore have been a verdict directed for the company, and for the refusal to direct such verdict the judgment must be reversed.

JOHNSON V. DEVOE SNUFF COMPANY.

Court of Errors and Appeals, New Jersey, November, 1898.

MASTER AND SERVANT — RISK OF EMPLOYMENT. — 1. The doctrine of the assumption of obvious risks by the servant applies as well to those which first arise or become known to the servant during the services as to those in contemplation at the original hiring (1).

2. Upon the discovery by the servant that he is being exposed to dangers in his employment not within the contract of hiring, it is his duty to give notice of the same to the master, and protest against such new or added dangers; and if he fails to do so, and continues in the service, he will be held to have assumed the risks thereof.

3. A servant lost a thumb, and suffered other injuries, by his hand being caught in the rollers of a snuff mill. He had a stick in his hand, which was one of the tools provided by the master, and was engaged in feeding leaf tobacco to the mill, and relieving the rollers when they became clogged. He was a man of full age, and an experienced attendant upon the mill. The master had ordered the servant to grind a lot of green or damp tobacco, to which the mill was not accustomed; its previous operations by the servant having been confined to the dry leaf. This material caused the rollers to become clogged more easily, and to exhibit an increased jumping motion above what ordinarily attended its operation, and enhanced somewhat the danger of the operator. The plaintiff continued to operate the mill under the changed conditions for three hours before the accident happened, in a well-lighted room, without making any complaint or objection to the master of the increased danger, which was obvious. Upon the trial of a suit for damages by the servant, at the close of the plaintiff's case he was nonsuited on the ground that the danger was an obvious one, the risk of which the servant, under the circumstances, must be held to have assumed. *Held*, on error, that the nonsuit was right.

(Syllabus by the Court.)

ERROR to Circuit Court, Middlesex County. From a judgment of nonsuit plaintiff brings error.

ROBERT ADRAIN, for plaintiff in error.

WILLARD P. VOORHEES, for defendant in error.

The facts and points decided are stated in the syllabus by the court.

Judgment affirmed.

Opinion by HENDRICKSON, J.

1. The court cited as being in point, *v. Railroad Co.*, 139 Mass. 580; *Fitzgerald v. Paper Co.*, 155 Mass. 155.
Mundle v. Mfg. Co., 86 Me. 400; *Leary*

MAHNKEN ET AL. V. BOARD OF CHOSEN FREEHOLDERS OF MONMOUTH COUNTY.

Court of Errors and Appeals, New Jersey, November, 1898.

CONTRIBUTORY NEGLIGENCE. — Upon a motion to nonsuit on the ground of contributory negligence, where the alleged negligence must be deduced from facts and circumstances in evidence, the question is usually one for the jury, and the motion will be refused unless it is established by the evidence beyond fair debate that the plaintiff was negligent, and that the negligence directly contributed to the injury complained of.

BRIDGES ARE HIGHWAYS. — A public bridge is a highway, and those traveling upon it as a part of a public road or street have a right to presume, in the absence of notice or knowledge to the contrary, that such bridge is clear of unguarded obstructions and dangers.

DEFECT IN BRIDGE — TRAVELER FAILING TO OBSERVE. — It is not negligence *per se* for a traveler upon a bridge, who is injured by a defect in the floor thereof, to lift his eyes from the path he is traveling, to other objects about him that may attract his attention, and thereby fail to observe the defect. Whether he be negligent or not, under the circumstances, in so doing, is a question for the jury.

BICYCLIST INJURED BY STEPPING INTO OPENING IN BRIDGE WHEN DISMOUNTING. — The plaintiff was riding a bicycle over a public draw-bridge in the day-time. As she approached the draw, she found it off, and a carriage in front of her waiting to cross, and another carriage coming up behind her. Concluding to dismount, she wheeled to her left to a timber guard dividing the wagonways, one foot square, and alighted on it. In doing so she stepped on the timber guard with one foot, and in her effort to step upon the floor of the bridge with her other foot she stepped into an opening along the timber guard, nine by five inches in dimensions, and was injured. She did not see the opening, but might have seen it if she had looked at the floor where she alighted. She brought suit against the board of freeholders of the county, which had charge of the bridge, and at the close of plaintiff's case on the trial, a nonsuit was granted on the ground that the danger was an obvious one, and that in her manner of alighting, and in selecting a place to alight, she was not in the exercise of due care, but was guilty of negligence which directly contributed to her injury. *Held*, on error, that the nonsuit was wrong, and that the question of contributory negligence should have been submitted to the jury.

(Syllabus by the Court.)

FROM a judgment of nonsuit of the Supreme Court, plaintiff brings error.

FRANK P. McDERMOTT, for plaintiffs in error.

JOHN S. APPLGATE, for defendant in error.

HENDRICKSON, J. — This writ brings up for review a judgment of nonsuit, which was ordered at the close of the plaintiffs' case by the

judge holding the Hudson Circuit Court, to whom the cause had been regularly referred for trial. The suit was brought to recover damages by Marie Mahnken and her husband, the plaintiffs below, for alleged injuries suffered by the wife, who will be herein described as the plaintiff, from stepping through an opening in a drawbridge over the South Shrewsbury river, in the public highway leading from Seabright to Little Silver, in the county of Monmouth, known as the "Rumson Road," and located at or near the borough of Seabright. The action is based upon the authority of the statute found in Gen. St., p. 307, which holds the board of chosen freeholders of a county responsible for damages to a person for injuries received because of its wrongful neglect to erect, rebuild, or repair a bridge under its charge, as required by law. The plaintiff was returning upon her bicycle from a short visit to Seabright. She was alone at the time, but was expecting a couple of friends, with whom she had been riding in company, to overtake her. Upon reaching the bridge, she found that the draw was off, and that there was a carriage waiting in front of her, and one coming behind her. She was then upon the bridge, and concluded to alight from her wheel, which she did, by wheeling up to the timber guard or string piece which separates the two driveways across the bridge, and there dismounting. She did this by stepping upon the timber guard with her right foot, and stepping down with her left foot from the pedal, to the floor of the bridge. While in the act of thus stepping down upon the floor of the bridge her foot went through an opening therein nine inches long and five inches wide, which had been left in the planking, alongside the timber guard, thereby causing her to fall, and receive severe bruises and lacerations about the knee and the adjacent parts, which are the injuries complained of. The timber guard was about one foot square in dimensions. It was developed on the trial that the defendant had acquired this bridge, which was formerly the property of a bridge company, by condemnation proceedings in 1892, since which time it had been under the care of the defendant. The bridge was built in 1887. This opening, with others similar in character, had been left in the bridge to receive the sweepings. On either side of the bridge there was a passageway for foot people, separated from the wagonways by a railing. The plaintiff had frequently passed over this bridge, but had not observed the openings along the timber guard, and did not observe them on the occasion of the injury, until her foot went into the one in question. The grounds upon which the nonsuit was ordered, as stated by the trial judge, were that the danger from the opening was an obvious one, which the plaintiff must have seen, if she had been in the exercise

of ordinary care, when she alighted from her wheel; that she had a right, being in the use of a vehicle, to be on the driveway of the bridge, but that there was a question whether she had a right to alight at the timber guard, where the opening had been located as a part of the construction of the bridge, and so located that people could not get into it, without getting where they had no right to be; that the place was a dangerous one, and the danger was obvious. This view has been presented by counsel, in the argument here, with the added point that there was no negligence on the part of the defendant.

The first proposition submitted is that there is shown to have been a want of ordinary care on the part of the plaintiff in dismounting from her wheel. One of the specifications under this head is that her manner of dismounting, as described by herself, is an unnatural and awkward one, and that a fall would be the natural consequence of such an attempt; but it must be noticed that there is no evidence on this point, except that of the plaintiff, and she says she was familiar with the wheel, and accustomed, in its use, to mount and dismount without assistance, and that, this being a lady's wheel, she dismounted in a proper manner on this occasion. Upon cross-examination some doubt may have been raised as to this by her admission that, while she put the right foot over the wheel, and placed it on the timber guard, she retained her seat in the saddle. But upon her re-examination she explained that she did not mean that she sat still on her wheel while dismounting, and that the rider cannot sit still in so doing, but must rise in the seat and stand on the pedal, and that there was nothing out of the ordinary in her manner of dismounting on this occasion. Counsel admits that this manner of dismounting is all right, if done in a level place, but insists that it is not the best way to alight when approaching an elevated object. Now, in the absence of other evidence, can the court say that there is room for but one opinion or conclusion from the facts as to her want of due care in alighting, and that it is clearly manifest that her carelessness directly contributed to this injury. I think, taking the evidence most favorable to defendant's contention, the question is a debatable one, and, if so, it must be submitted to a jury. *Railroad Co. v. Righter*, 42 N. J. Law, 180; *Railroad Co. v. Moore*, 24 N. J. Law, 824; *Durant v. Palmer*, 29 N. J. Law, 544; *Houston v. Traphagen*, 47 N. J. Law, 23; *Comben v. Stone Co.*, 59 N. J. Law, 226, 36 Atl. Rep. 473, 1 Am. Neg. Rep. 117; *Whart. Neg.* (2d ed.) 420; *Railroad Co. v. Matthews*, 36 N. J. Law, 531; *Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. Rep. 1094.

It is further urged that plaintiff was negligent in failing to see the.

opening and avoiding it; that the occurrence took place in the full light of day; that there was no obstruction to her view, and that so large an opening must have been plainly visible; that she had wheeled over this bridge, confessedly, many times, and must have known of the existence of these openings, and that previous knowledge of the danger must defeat her right to recover. But again the question arises, is the evidence so clear and convincing on these points that there can reasonably be no other inference but that the plaintiff was negligent? A public bridge being a highway, the principles of the common law of highways are applied to such bridges. 9 Am. & Eng. Enc. Law, 365. Such a bridge is the one now under consideration. In *Proprietors of Bridges v. Hoboken Land and Imp. Co.*, 13 N. J. Eq. 518, such a structure is described thus: "A bridge, by the concurrent testimony of all past time, in every possible shape and form, is but the ordinary road, carried across the river," etc. So that we may justly assume that the plaintiff had a right to be on any part of the traveled wagonways of the bridge. She also had a right to presume that they were clear of unguarded obstructions and danger. *Durant v. Palmer*, *supra*; *Houston v. Traphagen*, 47 N. J. Law, 23; *Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. Rep. 1069; 1 *Shear. & R. Neg.* 333. It is, of course, the duty of a person traveling on a highway to keep such a lookout for patent defects as is usual with prudent drivers, but what is ordinary care under the circumstances is usually a question for the jury. It cannot be said that the plaintiff actually saw the opening in question, or even knew of the existence of any of these openings, for her uncontradicted evidence is that she did not. And on the question of whether she is to be held liable for imputed knowledge on the subject, on the ground that she must have seen them, if she had looked, the further principle of law is pertinent, that it is not negligence *per se* for a traveler on foot or upon a vehicle to lift his eyes from the path he is traveling, where there are other objects that may attract his attention. In *Durant v. Palmer*, *supra*, which was a suit to recover damages for injuries sustained by falling into an unguarded excavation, which was within the line of the street, and adjacent to a building of the defendant, in the night time, the plaintiff had deviated from the middle of the pavement to look at some goods in a store window, and, failing to look down and observe the excavation, he stepped into it. It was argued that thereby the plaintiff was culpably negligent, and could not recover; but in the opinion of this court it is held that: "The deviation from the middle of the sidewalk is not necessarily an act of carelessness, nor is the looking in at a store window conclusively an act of trespass

or negligence. They may be so or not, according to the peculiar circumstances of the case. They are matters of fact, to be submitted to the jury under the directions of the court, but they do not constitute sufficient ground of nonsuit." This doctrine is sanctioned in *Houston v. Traphagen*, *supra*, and in *Sheets v. Railway Co.*, 54 N. J. Law, 518, 24 Atl. Rep. 483. There are several circumstances to be considered in the present case in reaching a conclusion upon the question of whether the plaintiff was negligent in failing to see the place of danger. There was the presumption of law that the bridge was in a safe condition. There was a carriage in front of the plaintiff, and one coming behind her, as she was about to dismount, which might justly require a share of her attention. Upon the principle just referred to, it seems clear that these are matters to be submitted to the jury, and to be considered by them, upon a question of contributory negligence.

The only other question suggested by counsel is that no negligence is shown on the part of the defendant; that the openings were a part of the original structure, left for a useful purpose, too close to the timber guard to be dangerous to travelers by carriage or bicycle; and that an unmounted rider of the latter would not be reasonably expected to walk or stand over these openings. But, inasmuch as it is not unlawful for foot people to cross upon any part of the bridge, and that such an accident might happen from such an opening left unguarded and unprotected, can we say that upon the principles and under the authorities already referred to the question of negligence as to these particulars is not one upon which opinions might reasonably differ. Again, it is urged that municipalities are not bound to do more than to keep their streets and highways reasonably safe for travel, and that in the building or maintenance of a bridge only such care is required as a prudent man would exercise in view of the objects and purposes of the bridge. But who is to be the judge of a condition of reasonable safety in a highway, or that ordinary care has been exercised in the maintenance of a bridge, where an accident from its alleged faultiness is in question? I think it is clear that these questions are within the rule already stated, and come within the proper domain of the jury.

The result is that the judgment of nonsuit should be reversed, and a writ of *venire de novo* awarded.

HAVER v. CENTRAL RAILROAD COMPANY.

Court of Errors and Appeals, New Jersey, November, 1898.

PASSENGER ON TRAIN ASSAULTED BY BAGGAGE MASTER. — The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers, and to protect them against assault and other ill treatment by those employed by the carrier and under its control, and the grade of the employee or the scope of his employment is immaterial (1).

1. See note of cases on liability of master for malicious acts of servant, vol. 1 AM. NEG. REP. 524.

See also 8 AM. NEG. CAS., where the cases relating to assaults upon and ejection of passengers are arranged chronologically, in alphabetical order of states, from the earliest period to 1896.

The following are some recent decisions on the Liability of Carriers of Passengers for Unauthorized Acts of Employees:

Where a servant, while acting in the course of his employment, wilfully and maliciously inflicts an injury, the master is liable though the servant exceeds his authority. St. Louis, I. M. & S. R'y Co. v. Hackett, 58 Ark. 381.

A declaration alleging negligence of a flagman in directing plaintiff to alight from a moving train in the dark at an unsafe place, which failed to state that the flagman had authority to give the direction, or that he was acting within the scope of his duties, or that it was given by direction of the conductor, was insufficient. Savannah, F. & W. R'y Co. v. Wall. 96 Ga. 328.

Where a passenger's thumb was caught and crushed by a car door that a porter, unaware that the passenger was following him, had just slammed, and that the passenger had attempted to prevent shutting by putting out his hand, the company was not liable. Ham v. Georgia Railroad & Banking Co., 97 Ga. 411.

A carrier was not relieved from liability for the conductor's ejection of a passenger who refused to pay fare with money other than that he had tendered, which was a coin of peculiar appearance that the conductor in good faith believed a counterfeit, but which was legal tender. Atlanta Consol. St. R'y Co. v. Keeny, 99 Ga. 266.

A railroad company is liable in damages to a female for an assault with intent to commit rape upon her person by one employed by such railroad company as a baggage master upon a train on which such female is at the time a passenger. Savannah, F. & W. R'y Co. v. Quo, (Ga.) 3 Am. Neg. Rep. 777.

One who on purchasing a ticket was informed by the station agent that it entitled him to ride on a freight train, which, under the company's regulations was not allowed to carry passengers, was not on entering the train a trespasser and the company was liable for an assault by the brakeman who threw him from the train while it was in motion. Ill. Cent. R. Co. v. Davenport (Illinois, December, 1898) 52 N. E. Rep. 266.

Where the driver of a team of horses hitched to a carriage in which persons were riding, stopped near a mill from which the noise of escaping steam from a steam whistle might frighten the horses, and he failed to retain possession of the reins, or to adopt any

FROM a judgment of nonsuit of the Circuit Court, Hudson County, plaintiff brings error.

The declaration in this case is in tort. It avers that the plaintiff boarded one of the trains of the defendant, the Central Railroad Company, a common carrier for the transportation of passengers and baggage between the city of Elizabeth and Bayonne, and that

means to prevent them from running away while he was engaged in closing the windows in the carriage, there were reasonable grounds to justify a jury in finding that he was careless and incompetent. *Benner Livery and Undertaking Co. v. Busson*, 58 Ill. App. 17.

A person who, for disorderly conduct, was ejected from a waiting room by a ticket agent, cannot recover for injuries inflicted by the agent on the platform during an altercation provoked by the person's insulting language, such injuries not being inflicted in the course of the agent's employment. *Chicago and A. R. Co. v. Randolph*, 65 Ill. App. 208, 8 Am. Neg. Cas. 195.

In an action for damages for the death of a passenger on a steamboat who was killed by the mate, it is no defense in an action against the company that the class of men usually employed on steamboats were quarrelsome and violent. *Memphis and C. Packet Co. v. Pikey*, 142 Ind. 304, 8 Am. Neg. Cas. 221.

A passenger unjustifiably assaulted by a brakeman on the train may recover from the company. *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 8 Am. Neg. Cas. 280.

Where a brakeman had an altercation with a passenger, and the conductor reported it at a station to a superintendent, who advised that the passenger be removed from the train, and the conductor then procured a policeman who went into the car and arrested the passenger without a warrant, and who was subsequently imprisoned, the company was liable for

the false imprisonment. *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 8 Am. Neg. Cas. 280.

In an action against a street railway company for personal injuries, plaintiff was entitled to recover if, while on defendant's car as a passenger, he was abused by defendant's conductor, and if the abuse was continued to the sidewalk, and plaintiff was knocked down by the conductor, unless the jury believe that plaintiff was the aggressor, and while on the car abused the conductor, or assaulted him either on or off the car; and, if more force were used by the conductor than was necessary, the company is not responsible if plaintiff was the aggressor. *Wise v. South Covington & C. R'y Co.*, 91 Ky. 537, (2d appeal, 34 S. W. Rep. 894).

In an action against a railroad company for an assault by its conductor on a passenger, where it appeared that the latter, as he presented his ticket made a remark to the conductor, who thereupon struck the plaintiff with his fist, and then with his lantern, it was proper to refuse to charge that if the jury believed that plaintiff used foul and abusive language to the conductor, which caused or provoked the assault, and that, in making such assault, the conductor was not acting within the scope of his duties, but was carrying out a personal purpose and feeling, the company would not be liable. *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 8 Am. Neg. Cas. 360.

It is within the line of a conductor's authority to eject a passenger, and if done wrongfully, recklessly, and oppressively, is cause for recovery of exemplary damages. *Lucas v. Michi-*

he did thereupon pay the said defendant his fare for passage; that while a passenger as aforesaid, and traveling in the train of the said company, he was then and there insulted and abused by one Simeon D. Apgar, a baggage master in the employ of the defendant, and with force and arms was, without cause or provocation, assaulted by the said employee of said company, whereby the plaintiff was

gan Cent. R. Co., 98 Mich. 1, 8 Am. Neg. Cas. 431 n.

Where an employee in charge of a gravel train took plaintiff, a boy seven years of age, on the train with him, and the boy expressing a wish to go home, was advised by the employee to get on an approaching freight train, and plaintiff got on a heap of gravel between the tracks and caught hold of the caboose, and as he did so the gravel slipped under him and he was caught by the wheels and injured, the advice of the employee was not within the scope of his employment, and it being the proximate cause of the injury, the company was not liable. *Keating v. Michigan Cent. R. Co.*, 97 Mich. 154.

Though an engineer violates an express rule of the company by running his engine from one station to another without orders from the train dispatcher, he is acting within the line of his employment, and the company will be liable to a passenger injured through such misconduct. *Fitzsimmons v. Milwaukee, L. S. & W. R'y Co.*, 98 Mich. 257.

A brakeman who forced a trespasser from a moving train without an order from the conductor, though the rules of the company required that he should act under the orders of the conductor, was acting without authority, and the company was not liable. *Randall v. Chicago & G. T. R'y Co.*, (Mich.) 3 Am. Neg. Rep. 679; *Hartigan v. Michigan Cent. R. Co.*, (Mich.) 71 N. W. 452.

Where a flagman, whose duty it was, on discovering a trespasser on a train, to take him to the conductor, and then,

if so directed, to stop the train and put him off, on his own responsibility ejected a trespasser while the train was in motion, the company was liable for the injuries that resulted. *Southern R'y Co. v. Hunter*, 74 Miss. 444, 1 Am. Neg. Rep. 289.

Where a passenger went into an express car to get goods billed to him, there being no express agent at the station, and the train started but was stopped when the conductor discovered him, and he was told to get out, but refused to do so without his goods, and the train was again started when he attempted to leave, but finding that the train had passed the platform, tried to withdraw into the car when he was seized by the conductor, who was on the ground, and pulled out, the question whether the conductor was acting within the scope of his duties was for the jury. *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900.

A railroad company is not liable for injuries from the explosion of a torpedo placed on the track by a station agent for his own amusement, and not as a signal to any train, and the rules forbade placing them near a station. *Smith v. N. Y. C. & H. R. R. Co.*, (N. Y.) 78 Hun, 524.

A carrier is liable for an assault upon a passenger by one of the crew who goes outside of his line of duty to do it. *White v. Norfolk & S. R. Co.*, 115 N. C. 631, 8 Am. Neg. Cas. 564 n.

Where the decedent, while calling for his baggage, was shot by the depot agent on account of abusive language used by the decedent to the agent, a finding by the jury that the agent was acting in the line of his duty so as to

injured, wherefore he claims damages in the sum of \$10,000. The facts as they appeared in evidence were that the plaintiff in December last took passage in the defendant's cars at Elizabethport for Bayonne, Bergen Point; that he took his seat in the passenger compartment of the baggage car; that the baggage master immediately demanded his fare, which the plaintiff refused to give to him, and so the baggage master passed along and called the conductor, and the conductor came in; that, as soon as the conductor came in, he paid him his fare. Then the plaintiff testified: "As I was paying my fare the baggage master stood by the door, and the conductor went out of the door; and he passed along and said, 'You son of a bitch! I am notioned to punch the face off you;' and he grabbed hold of me and shook me, where I sat in the seat. The other passengers interfered, and he broke away from me. He was in the center. He tackled me again, and struck me with all the vengeance he had. I avoided the blow by keeping close to him, and he ran me along the aisle, and slammed me against the water cooler. Finally he let go of me, and threw me into the aisle of the car, against the other seats." On this evidence on the part of the plaintiff the court granted a nonsuit, whereupon the plaintiff sued out this writ of error.

render the railway company liable would not be disturbed. *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 8 Am. Neg. Cas. 564 n.

A railroad company is not liable for injuries to a person who jumped from a train after being told by an official that he was on the wrong train, that it was going slow, and that he could jump from it. *Rothstein v. Pennsylvania R. Co.*, 171 Pa. St. 620, 6 Am. Neg. Cas. 390.

Dirt and rock dumped against and into another's house by the section men of defendant while engaged in work ordered to be done, will render it liable though the injurious acts were not expressly authorized. *Ft. Worth & N. O. R'y Co. v. Smith*, (Tex. Civ. App.) 25 S. W. Rep. 1032.

Where the station agent was cross and refused information to a passenger as to the name of the next town or where she could find a hotel, and when

she asked for water pointed to a tank some distance away, and men and boys around the station jeered and laughed at her, the company was not liable. *Missouri, K. & T. R. Co. v. Kendrick*, (Tex. Civ. App.) 32 S. W. Rep. 42.

A railroad company is not liable for an assault upon a peddler by its section foreman on the grounds of the company, after the peddler, who had been a passenger, left the station to engage in his business. *Krantz v. Rio Grande W. R'y Co.*, 12 Utah, 104, 8 Am. Neg. Cas. 647.

The ejection of a passenger by the conductor of freight train ordered to carry no passengers is within the scope of his authority, and the company is liable for injuries sustained by the passenger in being ejected while the train was in motion. *Stone v. Chicago, St. P. M. & O. R'y Co.*, 88 Wis. 98, 8 Am. Neg. Cas. 679 n.

ROBERSON & DEMAREST, for plaintiff in error.

JOHN L. CONOVER, for defendant in error.

DEPUE, J. (after stating the facts). A master is liable for the trespass of his servant committed within the scope of his authority, even though in exercising his authority he use unnecessary violence; but for a trespass committed by the servant wilfully, or of his own malice, under color of discharging the duties of his employment, or where he has gone beyond the line of his duty to commit a trespass, the master will not be liable. This rule of law, where the relation of master and servant exists, uncontrolled by other circumstances, is well settled. It was so decided by this court in *Brokaw v. Transportation Co.*, 32 N. J. Law, 328. The action in that case was in trespass, for ejecting the plaintiff with force and arms out of the car of the railroad company "while he was traveling in said car," and the case was before the court on demurrer. Whether the plaintiff was lawfully a passenger in the company's car, and entitled to the privileges and protection due from the carrier to its passengers, does not appear in the case. The plaintiff in this case became a passenger in the defendant's car, and at the time of this occurrence had paid his fare to the conductor, and was entitled to all the rights, privileges, and protection which the law accords to passengers, and subject to the duties and liabilities which the law imposes on a carrier for the safety of its passengers. The case now before the court depends, not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passenger against violence, from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances, and the number and character of persons on board. *Cooley, Torts*, 644; 5 *Am. & Eng. Enc. Law* (2d ed.) 541. In the application of this principle, the grade of the employee by whom the injury was done, or the scope of his employment, is immaterial. The courts of England seem to apply to such a situation the ordinary rule that prevails as between master and

servant. *Allen v. Railway Co.*, L. R. 6 Q. B. 65 (1); *Walker v. Railroad Co.*, L. R. 5 C. P. 640(2); *Railway Co. v. Broom*, 6 Exch. 314(3). In *Isaacs v. Railroad Co.*, 47 N. Y. 122 (4), the Court of Appeals of New York held that the defendant was not liable for the act of the conductor in pushing a passenger from the car while it was in motion. The decision was put upon the ground that the act of the conductor was a wanton and wilful trespass, not in the performance

1. In *Allen v. London & S. W. R'y Co.*, L. R. 6 Q. B. 65, it was held that a clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and to receive the money, and to keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased; as such arrest could not be necessary for the protection of the company's property, and the company was therefore not liable for the act of the clerk.

In such action it appeared that the clerk in handing plaintiff change gave him a foreign coin which he refused to receive, but the clerk declined to take it back, and plaintiff threw the coin upon the counter and said: "I will have my right money;" whereupon the clerk gave him into custody and charged him with attempting to steal money from the till. On trial of the suit against the railway company for false imprisonment, plaintiff was nonsuited.

2. The facts in *Walker v. South-Eastern R'y Co.*, L. R. 5 C. P. 640, were: A constable, who was a servant also of the railway company, after the conclusion of a scuffle in a station-yard between some of the company's servants and other persons, wrongfully gave A. into custody on a charge of assaulting the servants of the company. By the regulations of the company their constables were authorized to take into custody any one they saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or

affray; but they were directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed: *Held*, that the company was not liable for the act of their servant, as the constable was not acting within the scope of his employment.

In such action it appeared that B. refused to leave a station-yard of the company, and a struggle thereupon ensued between him and the servants of the company, during which he was wrongfully given in charge by a constable of the company, employed under the above rule: *Held*, that there was evidence that the company was acting within the scope of his employment.

3. In *Eastern Counties R'y Co. v. Broom*, 6 Exch. 314, it was held that if the servant of a corporation commits an assault by the authority of the corporation, an action for assault and battery is maintainable against the corporation. *Held*, also, that if an assault is committed on behalf and for the benefit of a corporation, the corporation may ratify the act of the agent, and if they do so they render themselves liable to an action for the assault. *Held*, also, that if a servant of a railway company, acting on behalf of the company, assaults and imprisons a passenger, to compel him to pay his fare for riding in a carriage of the company, the act of the servant is one which may be for the benefit of the company, and may be ratified by the company.

4. *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122, is reported in 8 Am. Neg. Cas. 524.

of any duty to, or any act authorized by, the defendant, and therefore the defendant was not liable. This case was overruled in *Stewart v. Railroad Co.*, 90 N. Y. 588 (1). In that case the plaintiff, while a passenger on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor. It was held by the court that the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting in the scope of his employment did not apply as between a common carrier of passengers and a passenger, and the principle was affirmed that a common carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. *Isaacs v. Railroad Co.* was set aside, in the decision of this case, on the ground that that case had been determined by the court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. *Stewart v. Railroad Co.* was affirmed and followed in *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. Rep. 319 (2), in which it was held that, whatever be the motive that incites the servant to commit an unlawful and improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences. This liability was deduced from the obligation of the carrier to protect the passenger against any injury from negligence or wilful misconduct of its servants while it performed its contract to carry. In some of the cases, in defining the liability of a carrier of passengers for the wilful acts of his servants, the expression "within the scope of employment," or "in the line of duty," is used. Neither of these expressions, in the usual sense, is applicable to this subject, except as descriptive of circumstances under which the liability of the carrier is unchallenged. Thus in *Steamboat Co. v. Brockett*, 121 U. S. 638, 7 Sup. Ct. Rep. 1039 (3), the court held that a common carrier undertakes absolutely to protect his passengers against the misconduct or negligence of his own servant employed in executing the contract of transportation, and acting

1. *Stewart v. Brooklyn and Cross-town R. R. Co.*, 90 N. Y. 588, is reported in 8 Am. Neg. Cas. 547.

2. *Dwinelle v. N. Y. Central, etc., R. R. Co.*, 120 N. Y. 117, is included in a note of New York cases relating to Assaults upon and Ejection of Passengers, in 8 Am. Neg. Cas. 552-553.

3. *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, is included in a note of cases relating to Assaults upon and Ejection of Passengers, in the United States Supreme and Circuit Courts, in 8 Am. Neg. Cas. 703-707.

within the general scope of his employment. In that case the action was founded upon an assault committed by a servant upon a passenger in enforcing rules and regulations of the company, and consequently the act was done while the servant was acting within the general scope of his employment. The case did not call for the consideration of the liability of the master under other circumstances; and it will be observed that Mr. Justice Harlan, in delivering the opinion of the court, quotes with apparent approbation the principle adopted in *Stewart v. Railroad Co.*, 90 N. Y. 588-591, that a common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract. The expressions above quoted, used in the cases, seem to mean nothing more than that the carrier is not liable for the acts of the servant when he is off from the duties of his employment, and consequently not employed in executing the carrier's contract of transportation. In *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922, the suit was against the owner of a steamboat on which the plaintiff was a passenger. A dispute arose between the plaintiff and the clerk about the payment of fare. Subsequently the plaintiff was assaulted by the clerk on board the vessel, and during the same trip. The defense was that the clerk was not at the time of the assault acting in the course of his employment, and therefore the owner of the vessel was not responsible for his acts. Mr. Justice Clifford, in overruling the defense, said that "the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy." Speaking of the defense, the learned judge said: "Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agent employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party

bound to make compensation for the breach of the obligation." The above extract from *Pendleton v. Kinsley* is quoted with approbation in *Bryant v. Rich*, 106 Mass. 180-189 (1). The liability of the carrier in such cases rests upon the principle that he has engaged to perform certain duties, and has selected his own servants for the performance of those duties, and hence an assault by an employee is a breach of the duty of the carrier to his passenger. This subject is discussed by Mr. Elliott as follows: "There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term 'scope of employment,' or 'line of duty' in a different sense in different cases, or to a failure to place the decision on the correct ground. It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. * * * Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, R. R., § 1638. The cases on this subject in the courts of our sister States are not harmonious, but the great weight of authority is in favor of the doctrine declared by the New York cases which have been cited. The decisions are collected in an elaborate note to 5 Am. & Eng. Enc. Law (2d ed.) 541-548. It is quite unnecessary to reproduce them here. The doctrine that a common carrier of passengers undertakes to carry a passenger safely and securely is nowhere impugned, and to apply to assaults upon a passenger by one of its employees the doctrine that rests solely upon the relation of principal and agent is to overlook the peculiar obligation that rests upon the carrier of passengers, and the liability which results from the failure to discharge that obligation. In actions against common carriers, the plaintiff may sue in assumpsit on the contract to carry, or in case on the common-law duty. 1 Saund. Pl. & Ev. 325.

Under the evidence appearing on the record, the nonsuit should not have been granted, and the judgment should be reversed.

1. *Bryant v. Rich*, 106 Mass. 180, is reported in 8 Am. Neg. Cas. 392.

DESERANT v. CERILLOS COAL RAILROAD COMPANY (1).

Supreme Court, New Mexico, December, 1898.

MASTER AND SERVANT — MINER KILLED BY EXPLOSION IN COAL MINE. — In a suit brought to recover for the death of a coal miner, who is killed in an explosion in a coal mine, where the plaintiff claims that the explosion was caused by an air course being partially obstructed by accumulation of water, so that sufficient air was not passing through it to properly ventilate the mine, the burden of proof is on the plaintiff to show that such air course was so obstructed that sufficient air was not passing through it.

FELLOW-SERVANTS. — The pit boss of a mine, working under a superintendent who has charge of the whole property and its workings is a fellow-servant of the other employees, and the corporation is not liable to an administratrix for the death of an employee caused by an explosion occasioned by workmen going into a room where there is an accumulation of gas, over a danger signal, with a naked light, either by the direction of the pit boss or with him.

(Syllabus by the Court.)

FROM judgments of District Court, Santa Fe County, in favor of defendant, plaintiff brings error.

NIELL B. FIELD and FRANK W. CLANCY, for plaintiff in error.

HENRY L. WALDO and RALPH E. TWITCHELL, for defendant in error.

MILLS, CH. J. This is the second time these cases have been here for review. In these several actions damages are claimed by the plaintiff, as administratrix, against the defendant, for the death of her husband, Henry Deserant, and her sons, Jules Deserant and Henry Deserant, Jr., by an explosion which occurred in the White Ash Mine on Wednesday, February 27, 1895, at about 10:45 A. M. For the purpose of the trial, the three cases were consolidated by order of the court below, and were also heard in this court in the same manner. The declarations charge negligence in various ways, but on the trial no proof other than circumstantial was offered to show what was the cause of the explosion, or where it began. In the language of the learned judge who wrote the opinion when this case was last before this court: "It appears that by this explosion all the employees, twenty-three in number, who were at the time in the further left entry (except those in what was called the 'Plane'),

1. See note of previous decision in this case in 4 Am. Neg. Rep. 87.

were killed, and therefore all evidence to show how the explosion occurred, and where was its initial point, is necessarily circumstantial." *Railroad Co. v. Deserant*, 49 Pac. Rep. 807. It is unnecessary for us to go into the particulars of the accident or show the workings of the mine, as they are sufficiently set out in the case of *Railroad Co. v. Deserant*, *supra*, heretofore reported. The only substantial difference in the evidence is that on the former trial it was testified that the body of Kelly was found in the upper crosscut, between rooms 8 and 9, and the body of Flick was found on the railroad track, in room No. 8, above the crosscut; while in the present case it is shown by the testimony of Kelly, one of the witnesses for the plaintiff, that the bodies of Kelly, Flick, and Donohue were found within a few feet of each other. The theory of the prosecution as to the cause of the explosion is the same now as then, to wit, that, owing to an accumulation of water, previous to the explosion, in a low place in the fourth left air course, a sufficient quantity of pure air was not going to the face of the workings, in the fourth left entry, to remove and expel the noxious gases; that Kelly and Flick, who were company men — that is, men who were paid by the day, and not according to what work they did — acting under instructions from Donohue, the day pit boss, went with him, or by his direction, into room 8, to remove a railroad track, carrying naked lights, and that such lights set fire to the gas which had accumulated there by reason of the insufficiency of air, and caused the explosion. This theory is purely speculative, and is not supported by the evidence. It cannot be positively proved what was the initial point of the explosion or what caused it. In fact, the evidence goes to show, from measurements taken at various times by the superintendent of the mine, the pit boss, and the United States inspector, that sufficient air was going through the fourth air course and mine to make it safe. Indeed, the evidence goes further, and shows that after the explosion, and on the day of the investigation by the coroner's jury, and while much of the debris caused by the explosion was still in the fourth left air course, a sufficiency of air was passing through it, over the water and debris, through the low place, which was claimed by the plaintiff to have been obstructed by water, for the proper ventilation of the entry and its rooms, and the expulsion of all harmful gases, and for the men and animals working there at the time of the explosion. There is no evidence that the condition of the fourth left air course was the direct or proximate cause of the explosion, and, for the plaintiff to recover, this must be proved by a preponderance of evidence. That Flick, Kelly, and Donohue were fellow-servants of

the deceased cannot be questioned. It is true that Donohue was an employee of a higher grade than either Kelly, Flick, or the deceased, but still he was a fellow-servant. This has been too often decided to need to be enlarged upon here. *Railroad Co. v. Martin*, 7 N. M. (Gild.) 158, 34 Pac. Rep. 536; *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. Rep. 603; *Mining Co. v. Whalen*, 168 U. S. 86, 18 Sup. Ct. Rep. 40. If, therefore, the contention of the plaintiff is true, that the explosion was caused by Kelly and Flick, by the order of Donohue, or by all three, going into room No. 8, where there was an accumulation of gas, with a naked light, over the danger signal (although, as before stated, that this was the cause of the explosion is purely speculative), and causing it to ignite, the plaintiff cannot recover, as the accident was the result of the negligence of a co-employee or fellow-servant. This case is governed by *Railroad Co. v. Martin*, 7 N. M. (Gild.) 158, 34 Pac. Rep. 536; *Railroad Co. v. Deserant*, 49 Pac. Rep. 807; and by a series of decisions in the United States Supreme Court undistinguishable in principle from this one (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914; *Mining Co. v. Whalen*, 168 U. S. 86, 18 Sup. Ct. Rep. 40, and cases there cited).

It is unnecessary for us to consider the objections urged to the instructions given by the court below. In our opinion, they were all in favor of the plaintiff, as the court should have granted the motion of the defendant, and instructed the jury to find the defendant not guilty. There is no error in the judgment of the court below, and it is therefore affirmed.

McFIE, PARKER, CRUMPACKER, AND LELAND, JJ., concurred.

TINKER v. NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY.

Court of Appeals, New York, November, 1898.

OBSTRUCTION PLACED IN HIGHWAY BY OWNER OF SOIL — HORSES FRIGHTENED. — Where it appeared that defendant removed timbers from a cattle guard that it was repairing, and placed them in a ditch alongside the traveled part of the road, but that was a part thereof, and the plaintiff's horses became frightened at the timbers, and plaintiff was thrown out and injured, the fact that the defendant was the owner of the highway, subject only to the use thereof by the public, was no defense to the action.

APPEAL from judgment, Supreme Court, General Term, Fourth Department, in favor of plaintiff.

HOWARD D. NEWTON, for appellant.

GEORGE W. RAY, for respondent.

PARKER, CH. J. This judgment awards to the plaintiff \$5,000 for damages which she sustained by being thrown to the ground from her seat in a wagon. The jury have found that the accident was caused by the horses drawing the wagon becoming frightened at two heavy timbers, about ten feet long and twelve inches square. These timbers were weatherbeaten, and nearly black "with oil and stuff on them." They were lying in a ditch from one to two feet in depth, at a distance of about ten feet from the traveled part of the highway, and about fifteen feet from the fence separating the highway from the defendant's land. The jury have found that the horses were roadworthy, and, as the record is not wholly without evidence to support the finding, it cannot be questioned here. While the sticks complained of were situated within the highway limits, although not in the beaten track, the defendant was the owner of such highway, subject only to the rights of the public in and to it for highway purposes; for the land on both sides of the highway at this point belonged to defendant. It insisted upon the trial: First, that it was not responsible for the placing of the sticks upon the highway; and, second, if it was, that the act was one clearly within its rights as owner of the fee of the highway.

As to the first question, it appears that on the 4th day of September, two days before the accident, certain employees of the defendant were engaged in taking out old cattle guards and putting in new ones on defendant's railroad at a point from thirty to fifty feet distant from the place where the sticks were placed. When the sticks were first taken out of the cattle guard, they were moved into the highway far enough to get them out of the way while a new cattle guard was being put in and completed. When the work was finished these sticks were taken across the highway, and then along it for a distance of about fifty feet, and deposited in the ditch. The appellant does not contend that it is not responsible for the acts of its servants while engaged in the master's business within the scope of their employment, and it concedes that inasmuch as its servants were repairing the cattle guards, in the doing of which they were compelled to take out the sticks and place them somewhere, if they or their foreman decided to put them in the ditch the act was one for which their master, this appellant, would be chargeable; but it does insist most strenuously that the evidence conclusively establishes that the two sticks were appropriated to the use of one Volmer, who was an employee of the defendant, and connected with the section gang at work on the cattle guards. The witness Atwell,

when asked why the sticks were placed where they were, answered that one of the men, Anthony Volmer, was to have them, and the men carried them over to the ditch for the purpose of assisting him in securing them. This, with other evidence adduced by the defendant upon the subject, shows, the appellant insists, that while the section gang was proceeding in the discharge of the master's work, and before putting the sticks on its own property, outside of the line of the highway, as it did in another instance, one of the servants stepped in and appropriated the sticks as his own; that while it is true he was not the foreman, and could not command, yet he persuaded his fellow-laborers to assist him in the appropriation. Thus, appellant urges, it appears that the men, instead of being engaged in the master's business, were taking property away from that master, and aiding another person to appropriate it. Upon this foundation counsel constructs a most interesting argument, leading to the conclusion that the defendant should not be charged with the responsibility of placing the sticks in the ditch. But the difficulty with this contention in this court is that here it must be assumed that the fact is not as the appellant claims. While the record contains the evidence referred to, tending to show that the sticks were placed in the ditch for Volmer's convenience, upon the understanding they were to be used by him for firewood, there were present certain circumstances that persuaded the trial court that the question whether Volmer and his associates did undertake to convert the sticks to Volmer's use was presented for the jury, and so that question was fully and fairly submitted to them. The verdict that followed established, so far as this review is concerned, that the deposit of the sticks in the ditch was not in pursuance of a plan to appropriate them to Volmer's benefit. In our further consideration of the case, therefore, we are to assume that the defendant is responsible for the acts of its employees in placing the sticks in the ditch.

The appellant next insists that, although it be charged with the acts of its employees in depositing the sticks as complained of, yet as it owned the fee, and had the right temporarily to make necessary and reasonable use of the highway in the course of its business, and only exercised such right while engaged in repairing the cattle guards, it can be held responsible for damages resulting from such use only by showing that it was negligent; and the claim is that under the evidence submitted the defendant cannot be charged with negligence. The primary purpose of highways is use by the public for travel and transportation, and the general rule is that any one who interferes with such use commits a nuisance. Indeed, the

statute declares it to be a public nuisance, and a crime against the order and economy of the State, to unlawfully interfere with, obstruct, or tend to obstruct, a street or highway. Pen. Code, § 385. There are some exceptions to the general rule. An abutting owner may, if necessary, temporarily and reasonably encroach upon the street by the deposit of building materials, a tradesman may convey goods in the street to or from his adjoining store, and in a variety of other ways the use of a highway for public travel may be temporarily interfered with, without the creation of what in the law is deemed a nuisance. But such obstructions must not only be temporary, but necessary in the transaction of the business of him who obstructs the highway, and reasonable as regards the rights of others. In *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. Rep. 418, it was held that any unnecessary or unreasonable use of a sidewalk or street, to the serious inconvenience of the public, is a nuisance *per se*. And while the court recognizes the right of the owner of the land abutting upon a public street, when necessary, to encroach upon the primary right of the public, to a limited extent and for a temporary purpose, it lays down the rule by which to determine whether an obstruction of a highway is lawful or a nuisance. It says: "Two facts, however, must exist, to render the encroachment lawful: 1. The obstruction must be reasonably necessary for the transaction of business; 2, it must not unreasonably interfere with the rights of the public,"—citing *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. Rep. 633, and *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. Rep. 264. It follows that, if an encroachment be not justified by these two facts, it is unlawful and a nuisance; and such is the law, unless the obstruction is one authorized by the municipal authority having control of the street. In such a case the owner is relieved from the imputation of trespassing in doing the act consented to, and is in the position of one liable for negligence only. *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. Rep. 132. The rule relating to encroachments on highways is not confined to obstructions in the beaten track, but embraces all parts of the highway; nor is it necessary that the injury should be done to a traveler coming in contact with the obstruction. "There is," says Mr. Thompson in his work on Negligence (volume 1, p. 349), "no judicial distinction between an injury happening through a traveler's horse taking fright at the object, and an injury happening through his coming into direct collision with it." Indeed, it has been held many times, in other States besides our own, that objects calculated to frighten horses of ordinary gentleness constitute an encroachment upon the highway which will support a recovery for injuries

sustained by the person injured without fault on his part. See cases cited in *Thomp. Neg.*, pp. 995, 1181. Recoveries for injuries occasioned through the frightening of horses by obstructions in the highway have been sustained in this State in the following cases: *Stewart v. Manufacturing Co.*, 13 N. Y. St. Rep. 220; *Champlin v. Village of Penn Yan*, 34 Hun, 33, affirmed without an opinion in 102 N. Y. 680; *Burns v. Town of Farmington*, 31 App. Div. 364, 52 N. Y. Supp. 229; and *Quinn v. Town of Sempronius*, 33 App. Div. 70, 53 N. Y. Supp. 325. In *Stewart's Case* the horses became frightened at boilers standing on the edge of the sidewalk, next to the gutter. In *Champlin's Case*, a banner suspended over the street so frightened a horse that he ran away; in *Burns's Case*, the horses were frightened by a pile of hub timber irregularly piled; while, in *Quinn's Case*, poles piled by the side of the road, intended for use in constructing barriers to a bridge, so frightened horses that they ran away. The last two cases were against towns.

The appellant cites *Eggleston v. Turnpike Co.*, 82 N. Y. 281, in support of his argument that the defendant was not a trespasser, and could be held liable, if at all, only on the ground of negligence. In that case the horses were frightened by a pile of stones that had been placed beside the traveled part of the road, about a week before the accident, to be used in repairing a bridge owned by the defendant, a turnpike company. It is true, the court said: "If the pile of stones had a tendency to frighten horses, and was of a dangerous character, although not technically a defect or obstruction in the highway, I entertain no doubt that the defendant could be made liable for damage caused to travelers thereby, after notice of its character and neglect to remove the same." But a very different question was presented in that case from the one before us. The action was brought against a turnpike company that was charged with the duty of maintaining the road and keeping it in repair; the pile of stones that frightened the horses was placed by the side of the traveled part of the highway for the purpose of making needed repairs to a bridge; the object aimed at was a proper one; indeed, it was the duty of the company to make the repairs, and, therefore, it was lawful and proper for it to place the stones where it did; but it neglected to repair the bridge promptly, with the result that several horses had been frightened before the plaintiff's were, and the plaintiff claimed to recover upon the ground that defendant negligently permitted the pile of stones to remain after notice had been given to it that the stones had a tendency to frighten horses traveling upon the road, and had actually done so. We have seen, then, that a person, even if he be

the owner of the land over which the highway passes, commits a nuisance, if he places in the highway an obstruction with which horses or vehicles may come in contact, or which is calculated to frighten horses of ordinary gentleness, unless the obstruction be reasonably necessary for the conduct of his business, and at the same time does not unreasonably interfere with the right of the public to make use of the highway.

Whether or not the evidence in this case justified the claim of the defendant that its action in placing the sticks where it did was reasonably necessary in the conduct of its repairs, and not an unreasonable interference with the rights of the public, presented a question of fact. This is obviously so, but in addition it should be said that it has been so decided by this court. *Callanan v. Gilman, supra*; *Flynn v. Taylor, supra*; *Hudson v. Caryl*, 44 N. Y. 553. It was the duty of the court, therefore, to submit to the jury, under all the facts of the case, the question whether the use which the defendant made of the highway was necessary and reasonable, within the rule we have referred to. This the court did, in a charge which was fair and free from legal fault.

As there was no error in the rulings of the court in admitting or rejecting evidence, it follows that the judgment should be affirmed, with costs.

All concur (HAIGHT, J., in result), except O'BRIEN, J., dissenting, and MARTIN, J., not sitting.

Judgment affirmed.

FARRELL V. TATHAM ET AL.

*Supreme Court, New York, Appellate Division, Second Department,
January, 1899.*

MASTER AND SERVANT—RISK OF EMPLOYMENT.—Where an employee had worked in a shot tower for some months, and knew that some of the kettles used for holding the molten lead had no hoods on them, and that the lead sometimes splashed from such kettles, he assumed the risk of injury that resulted from such splashing.

APPEAL from judgment, Supreme Court, Trial Term, Kings County.

CHARLES C. NADAL (EDWARD P. MOWTON, on the brief), for appellants.

PATRICK KEADY, for respondent.

WILLARD BARTLETT, J. — The plaintiff was injured in jumping from a platform to avoid the splashing of molten lead out of a kettle

near which he was at work for the defendants, in their shot manufactory, in the city of New York. This kettle had no hood over it. There were twelve or fifteen kettles, in all, in the establishment, of which seven or eight had hoods over them, if we may believe the testimony of one of the defendants, while nearly all were hooded, if the evidence in behalf of the plaintiff is correct. According to this defendant, the hoods are put over the kettles solely to carry off the fumes which rise from the melting metal, while, according to the plaintiff's witnesses, the hoods are intended to serve the further purpose of preventing the lead from splashing out on the workman. The splashing which the plaintiff sought to escape when he was injured immediately followed the act of his foreman in putting a pig of lead into the molten metal, which already filled the kettle to three-fourths of its capacity. The evidence does not show whether the impact of the solid lead against the liquid lead forced the latter out of the kettle, or whether the splashing was due to the presence of moisture upon the surface of the pig lead, which moisture was changed into steam by the heat in the kettle, although there is testimony which suggests the latter as the true explanation of the accident. Whatever may have been the fact in this respect, the only ground which the proof discloses for charging the defendants with negligence is their failure to provide a hood for the kettle on the platform whence the plaintiff jumped. While it was proved that the hoods did not wholly prevent the lead from splashing out, it is apparent that they must have afforded the workmen some protection. The plaintiff, however, knew that there was no hood upon the kettle on the platform where he was at work. He had been employed in the shot manufactory of the defendants for months. He was thoroughly familiar with the process of lead melting as carried on there, and had repeatedly seen the lead splash out of this very kettle, as well as out of the hooded kettles. He was aware of the danger, and exposed himself to it, with complete knowledge as to its presence and character, and, so far as appears, without complaint, objection, or remonstrance. It seems to us that the only inference fairly deducible from the evidence is that the plaintiff voluntarily assumed the risk of any injury which might happen to him from the splashing of molten lead out of the kettle in the manner in which it occurred when he was hurt, and hence that he ought to have been nonsuited on the trial. *Kaare v. Iron Co.*, 139 N. Y. 369, 34 N. E. Rep. 901.

This view compels us to reverse the judgment.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

WALLACE v. THIRD AVENUE RAILROAD COMPANY ET AL.

*Supreme Court, New York, Appellate Division, First Department,
January, 1899.*

JOINT TORT FEASORS. — The dismissal of the complaint as to one of two joint tort feasons cannot be complained of by the other.

RUN OVER BY PASSING TRUCK AFTER FALLING FROM STREET CAR.

— Where the evidence on the part of the plaintiff tended to show that as defendant's car approached a crossing and had nearly or quite stopped to allow plaintiff's intestate to board it, and after he had got on the car it was suddenly started with a jerk, and he was thrown to the ground and was run over by a truck that happened to be passing and sustained injuries from which he died, and the defendant's evidence tended to show that the intestate slipped and fell before he reached the car, the question of negligence was properly submitted to the jury.

BOARDING MOVING STREET CAR. — An attempt to alight from or board a moving street car is not contributory negligence *per se* (1).

DAMAGES — VERDICT. — Where it was shown that the deceased at the time of his death was forty-three years of age, in good health, and left five children who were dependent upon him for support, and his salary had been \$1,250 a year, a verdict for \$9,000 was not excessive.

APPEAL from judgment, Supreme Court, Trial Term, New York County, in favor of plaintiff.

NATHAN OTTINGER, for appellant.

EDWARD C. JAMES, for respondent Mary Wallace.

GRANT C. FOX, for respondent David Mayer Brewing Co.

MCLAUGHLIN, J. — On the 18th of May, 1897, Thomas Wallace, in attempting to board one of the cars of the defendant railroad at the intersection of Third avenue and Eighty-fourth street, in the city of New York, was run over by a wagon of the defendant brewing company, and so injured that he died within a few hours thereafter. This action was brought to recover the damages alleged to have been sustained by the next of kin, upon the ground that his death was caused by the negligence of the defendants. Upon the trial, at the close of the plaintiff's case, a motion was made by each defend-

1. For actions relating to injuries sustained while Alighting from, or Boarding Trains, Street Cars, etc., decided in *New York*, from the earliest period to 1896, see vols. 5 and 6, Am. Neg. Cas. For actions in other States and in the Federal Courts, covering the same period, see vols. 2-7, Am. Neg. Cas. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

ant to dismiss the complaint, which was granted as to the brewing company, but denied as to the other defendant. A similar motion was also made by the railroad company at the close of the case, and denied. The jury returned a verdict of \$9,000; and from the judgment entered thereon, and from the order denying a motion for a new trial, the railroad company has appealed.

We are asked to reverse the judgment on the ground that the trial court erred in denying the motions made by the railroad company to dismiss the complaint, and in submitting the case to the jury. It is unnecessary to determine whether the complaint was properly dismissed as to the brewing company, for the reason that the plaintiff has not appealed, and the defendant railroad company cannot complain of the judgment in that respect, since its rights were in no way affected by it. If the deceased lost his life by the negligence of both defendants, then the plaintiff had the right to maintain the action against either or both of them. Both were not necessary parties to the action, for the reason that there was a separate liability as well as a joint one. *Creed v. Hartmann*, 29 N. Y. 591; *Wehle v. Butler*, 61 N. Y. 245; *Weidman v. Sibley*, 16 App. Div. 616, 44 N. Y. Supp. 1057. The question then remains, did the trial court err in refusing to grant the motion made by the defendant railroad company to dismiss the complaint as to it? After a careful consideration of the record, we are satisfied that the ruling was correct. The evidence on the part of the plaintiff tended to show that the defendant's car as it approached the crossing was brought nearly or quite to a stop, for the purpose of enabling the deceased and another person to step aboard, and that while the deceased was in the act of doing so, and after he had partially entered the car, the car, without any notice to him, was suddenly started with a jerk, and he was thereby thrown from it to the ground, and run over by the brewery wagon, which happened to be passing at that time. This is substantially what the plaintiff's witness Curran testified, and he was corroborated by the plaintiff's witnesses Stanley and Kamper. This being the situation at the close of the plaintiff's case, it requires neither argument nor authority to show that the motion to dismiss was properly denied. It was the duty of the railroad company, while the deceased, to the knowledge of its servants, was entering the car, either not to start the car until he had reached a place of safety, or else so to start it that he would not be injured, *Akersloot v. Railroad Co.*, 131 N. Y. 599, 30 N. E. Rep. 195 (1); and whether it performed its duty in this respect was, under the evidence then presented, for the jury to

1. *Akersloot v. Second Ave. R. R. Co.*, 131 N. Y. 599, is reported in 5 Am. Neg. Cas. 359.

determine. Neither do we think the court erred in refusing to dismiss at the close of the case. The evidence of the defendant tended to show that the deceased did not get on the car, and was not thrown from it, but that he slipped and fell before he reached it. This is substantially what the defendant's witness Gorman, the conductor of the car, testified; and he was corroborated to a certain extent by some of the defendant's other witnesses. With this conflict of testimony existing at the close of the whole case, it can readily be seen that a question of fact was presented, which was properly submitted to the jury for determination.

The question of the deceased's contributory negligence was also properly submitted to the jury. It cannot be said, as matter of law, that a person is, under all circumstances, negligent, if he attempts to enter or leave a street car while it is in motion. It depends entirely upon the speed of the car, and the question when presented is usually for the jury to determine. *Eppendorf v. Railroad Co.*, 69 N. Y. 195 (1); *Distler v. Railroad Co.*, 151 N. Y. 424, 45 N. E. Rep. 937, 1 Am. Neg. Rep. 135 (2).

The appellant also insists that the learned trial court erred in refusing to instruct the jury that, if they believed "the accident happened in the manner described by the defendant's witnesses, their verdict must be for the defendant." We think this request was properly refused. The testimony of some of the defendant's witnesses — notably, that of Seidel — tended to corroborate the plaintiff's witnesses as to the manner in which the deceased was injured. Seidel testified that the car started up just a little, and the deceased fell from the step. The jury might, therefore, well have believed the testimony given by some of the defendant's witnesses, and still have rendered a verdict in favor of the plaintiff. Other errors are alleged, both as to the charge as made and to refusals to charge, but they are without merit, and do not need consideration.

Finally it is urged that the damages awarded by the jury are excessive. We do not think so. The deceased at the time of his death was forty-three years of age, in good health, and receiving a salary of \$1,250 a year from the city of New York; he being at the time a member of the police force of that city. He left him surviving, five children, all dependent upon him for support; the oldest, a daughter, twenty-one years of age, and the youngest, a son, ten years of age.

1. *Eppendorf v. Brooklyn City and Newtown R. R. Co.*, 69 N. Y. 195, is reported in 5 Am. Neg. Cas. 219. 151 N. Y. 424, 1 Am. Neg. Rep. 135, reverses the decision in same case in 78 Hun, 252, 5 Am. Neg. Cas. 589.

2. *Distler v. Long Island R. R. Co.*,

Under such circumstances, a verdict of \$9,000 cannot be said to be excessive.

No error was committed by the trial court as to the admission or rejection of evidence; and the case was submitted to the jury, both upon the question of the defendant's negligence and the deceased's contributory negligence, by a charge which was entirely fair, and not in any way subject to the criticisms made by the defendant.

The verdict is not against the weight of, but is sustained by, the evidence; and it therefore follows that the judgment and order should be affirmed, with costs to the respondents. All concur.

BARKLEY V. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
December, 1898.*

MASTER AND SERVANT—INCOMPETENT EMPLOYEE—LOCOMOTIVE ENGINEER.—Where it appeared that a railroad employee was injured by the negligence of an engineer in charge of the locomotive and who had, to the knowledge of the company, previously killed six persons, though none of the killings, except one, that had occurred five years previously, was sufficient to charge the company with negligence in retaining the engineer in its employ, a finding that the company was negligent in retaining the engineer in its employ was supported by the evidence.

EMPLOYEE CROSSING TRACK AT STATION STRUCK BY TRAIN—CONTRIBUTORY NEGLIGENCE.—An employee of a railroad was directed to deliver a package to a train that stood upon the second track from the station. A train had just passed on the first track, and a second train the employee knew was scheduled to follow ten minutes after, and that the rules required to slow down and stop while the train on the second track was receiving and discharging passengers. The employee looked up the first track, and seeing no train, crossed the track, delivered the package, and, when returning, did not look up the track, and while crossing it was struck by said second train that was only three minutes behind the first one, and was traveling at the rate of thirty miles an hour, and that gave no warning of its approach. *Held*, that the employee was not guilty of contributory negligence.

APPEAL—LACHES.—A motion to have a verdict reviewed as contrary to the evidence, made eleven years after it was rendered, and without excuse for the delay, will not receive as favorable consideration as if the motion had been made promptly.

APPEAL from order of Special Term, denying a motion for a new trial.

EDWARD HARRIS, for appellant.

THOMAS RAINES and FRANK C. SARGENT, for respondent.

This action was begun September 3, 1885, to recover damages for a personal injury inflicted September 18, 1882, by the negligence, it is alleged, of the defendant and its employees. The action was tried in October, 1887, and resulted in a verdict of \$7,000 damages. Upon the coming in of the verdict, the court entertained a motion for a new trial on the minutes, which was argued in July, 1892; and August 8, 1892, an order was entered, entitled as of the circuit at which the trial was had, denying the motion, and giving the defendant sixty days in which to serve a proposed case containing exceptions. November 21, 1892, the defendant appealed from the order denying its motion for a new trial, and July 12, 1898, the case containing exceptions was settled and filed in the office of the clerk of the county of Monroe, and annexed to the judgment roll in the action. In July, 1882, the plaintiff, then eighteen years of age, was employed by the defendant, at its station at Fairport, N. Y., to load and unload baggage, freight, and express packages, acting under the direction of the station agent. At about half-past seven o'clock in the morning of September 18, 1882, the plaintiff was directed by the station agent to take a package from the station house, which stood on the south side of defendant's tracks, across track No. 1, and deliver it to the "Lyons Accommodation," a west-bound passenger train, due to leave Fairport at 7:36 A. M., and then standing on Track No. 2. The plaintiff delivered the package as directed, and started to return to the station house, when he was struck, at 7:36 A. M., and severely injured, by locomotive No. 564, running east on track No. 1, as the second section of passenger train No. 6, known as the "Special New York Express," running east, due to pass Fairport without stopping at 7:31 A. M., and did pass that station, on the morning of the accident, at 7:33 A. M., two minutes late. Train No. 6 and the Lyons Accommodation had been running on this time since June 25, 1882. By the time card, train No. 6 should, as before stated, have passed Fairport without stopping at 7:31 A. M., and five minutes before the Lyons Accommodation left the station, and did pass the station, on the morning of the accident, three minutes before the Lyons Accommodation should have left. This is the time, as testified to by Drexelius, defendant's train dispatcher at Rochester; so that locomotive No. 564 was running at a high rate of speed as the second section of No. 6, and three minutes behind it. Under the rules, both train No. 6 and the locomotive were required to pass Fairport without stopping, unless otherwise ordered, or unless a passenger train was standing at the station, receiving

and discharging passengers. As before stated, train No. 6 was an express passenger, and usually was a heavy train, and required the assistance of a helping locomotive up the grade from Buffalo to Batavia, at which place, its assistance not being longer needed, it was ordered to follow ten minutes behind train No. 6, as a second section thereof to Syracuse, from which city it took a train back to Buffalo. This running arrangement had existed since June 25, 1882, and the plaintiff knew all about the practice. On the morning in question, train No. 6 left Rochester at 7:15 A. M., on time; and locomotive No. 564, instead of leaving that city at 7:25 A. M., as it should have done, left at 7:20 A. M., only five minutes behind No. 6. Usually, train No. 6, when followed by the locomotive, carried flags indicating that it was followed by a train or a locomotive. Whether flags were carried on the morning of the accident was a disputed question of fact, which the jury, under the evidence, was authorized to find either way. Defendant's rule No. 75 provides: "The engineman must approach any station where another train is due or may be expected, with his train well under control, and must stop before passing when the other train is seen receiving or discharging passengers; and, in all cases where danger signals are set, he must stop before passing such signal." Locomotive No. 564 was run by Luther H. Hart as engineman, and, when it passed Fairport, the Lyons Accommodation was engaged in receiving and discharging passengers, there being an unusual number present to take that train to attend a fair at Rochester.

The further facts and points decided are stated in the syllabus.

Order affirmed and judgment ordered for the plaintiff on the verdict.

Opinion by FOLLETT, J.

MCDONNELL v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
December, 1898.*

TRAIN BROUGHT TO SUDDEN STOP BY ACT OF PASSENGER AND FELLOW-PASSENGER INJURED. — Where it appeared that while a train was going at the rate of about twenty miles an hour it was suddenly brought to a standstill by a passenger inadvertently pulling the emergency lever in one of the coaches, and the plaintiff was thrown from a car to the ground and injured, the company was not liable.

APPEAL from judgment, Supreme Court, Trial Term, Jefferson County, entered on verdict for defendant.

FRANK C. SARGENT, for appellant.

HENRY PURCELL, for respondent.

HARDIN, P. J. — Plaintiff was a member of an excursion party that left Picton and other parts of Canada on the 12th day of July, 1897. They were brought to Cape Vincent by boat, and from there were transported in two different special trains over the defendant's road to the city of Watertown. The excursion party left Watertown at about 6:30 o'clock in the evening, to return to Cape Vincent. The defendant provided for the excursion party eighteen cars. The party consisted of 840 passengers. The carrying capacity of the cars was 1,152. After the cars had passed some nineteen miles from the city of Watertown, the accident occurred of which the plaintiff complains. The train was brought to a sudden stop, and he was precipitated upon the ground. There was a conflict in the evidence whether he was on the platform of the fourth car from the front at the time of the occurrence of the accident, or whether he was inside of the door. His own testimony, and that of a witness who supports him, is to the effect that he was inside the car, near the door. Several witnesses testify, to the contrary, that he was on the platform; and there are several admissions indicative that he was himself careless at the time the injuries were received. In order to justify a recovery against the defendant, it was incumbent upon the plaintiff to establish that he was guilty of no negligence which contributed to the injury, and that the defendant was guilty of such negligence as caused the injury. *Deyo v. Railroad Co.*, 34 N. Y. 9. That case quotes with approval *Bowen v. Railroad Co.*, 18 N. Y. 408, and also quotes from Story on Bailments the rule in respect to the liability of a common carrier to its passengers, which rule is in the following language: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, to the utmost care and diligence of very cautious persons." In commenting upon that rule, Davies, J., said: "The familiar form of expressing the rule of duty of the carrier is, 'as far as human care and foresight will go.' Negligence is the violation of the obligation which enjoins care and caution in what we do." In that case "some evil and malicious person had drawn out spikes, and pushed some of the rails from their bed, and by this means the engine and part of the cars were turned off the track," and the plaintiff was injured. At the circuit plaintiff was nonsuited, and the judgment was sustained at general term and in the Court of Appeals. The same doctrine was approved in *Palmer v. Canal Co.*, 120 N. Y. 170, 24 N. E. Rep. 302.

Upon the trial now brought in review it was insisted by the

defendant that the principle applied in the cases to which reference has been made was applicable to the case in hand. Evidence was given, tending to establish that, while the train upon which the plaintiff was riding was in motion at the rate of about twenty miles an hour, one of the passengers in the rear coach went to the end of the car with a view of getting some water to drink, and, not finding the water readily in the tank, he looked up, raised up his hand, and suddenly pulled the lever controlling the emergency brake, and caused the same to operate so fully and so suddenly that it brought the train to a standstill in about half the length of a car, except that the engine and the three forward cars, having been severed, continued about 150 feet. The plaintiff insists that he was inside of the fourth car from the engine at the time the train was brought to a standstill, and that he was precipitated through the open door onto the ground, and received the injuries of which he complains. The evidence in behalf of the defendant indicates that he was upon the platform at the time the train was stopped, and that he was precipitated from the platform onto the ground. Evidence was taken upon the trial as to whether the stoppage of the train was caused by the application of the air brakes by one Smith, who was in the rear car, and testified that he pulled the lever. The plaintiff's theory was that the breaking in two of the train caused the plaintiff to be precipitated out of the car, and onto the ground. The conflicting theories maintained by the respective parties at the trial were very extensively discussed in the charge submitted by the learned trial judge to the jury, and the question in its various aspects was explained to the jury, and the weight of the evidence supports the finding of the jury that the unauthorized application of the air brakes to the train caused the same to be broken in two, and the sudden jar threw the plaintiff onto the ground. The plaintiff was a committeeman, having some duties to do in respect to the excursion, and he had passed from the rear cars forward, and had entered the foremost cars, and apparently was returning when the accident occurred. The evidence satisfactorily indicates that there were plenty of seats in the first three cars near the engine, and there is some evidence that there were seats in some of the other cars, unoccupied, and that the plaintiff might have occupied a seat in the train without any difficulty, which he failed to do. Grave questions of fact were presented for the jury to determine as to whether the defendant had been guilty of negligence and the plaintiff free from contributory negligence. Certain admissions made by the plaintiff, if believed, would warrant the jury in finding that he was not free from contributory negligence.

At the time the accident occurred the defendant was using the Gould coupler, and it gave evidence that that coupler was in use generally in the State of New York, and evidence tending to show its worthiness for the purposes for which it was designed. After the close of the defendant's evidence in chief the plaintiff put upon the stand one Kellogg, who testified that he was an inspector of cars in Jersey City, and that he was familiar with the different kinds of couplers, and that the Gould coupler was used upon the Lehigh Valley Railroad and West Shore Railroad, and that he inspected some 100 Gould couplers every day, and some 425 Jannay couplers, used on the Pennsylvania Railroad. He then explained the construction of the Gould coupler to a considerable extent, and, upon certain objections being made to some questions propounded to the witness, the court observed: "You may show, if you please, if you want to show, that in the operation of this coupler that there may be mistakes, and that it might not be properly coupled when they start. That is one thing. But to show that there is any defect in the Gould coupler, — that it is not a proper coupler to be used, — I don't see how you can do that." The witness was then allowed to give further description of the Gould coupler, and of its operations, and his observations in respect thereto; and an exception was taken to the remark of the court that he would not permit a litigation to show that one coupler or one brake was better than another, inasmuch as it appeared that the Gould coupler was in general use in the State. The exceptions were not taken to the questions propounded to the witness, but occurred in the colloquium that ensued between the counsel and court, and in some instances the evidence was received after intimations made by the court adverse thereto. Besides, it appears that the cars were inspected before the train left Watertown, and there is no evidence indicating that the parting of the train was caused by any omission to properly couple the cars; and a large volume of the evidence indicates that the uncoupling was caused by the power of the engine at the time the air brakes were applied by Smith in the rear coach.

Judgment and order affirmed, with costs. All concur.

WOODS v. BUFFALO RAILWAY COMPANY.

Supreme Court, New York, Appellate Division, Fourth Department.

December, 1898

EXPIRATION OF TIME LIMIT ON TRANSFER TICKET — EJECTION OF PASSENGER. — In an action for damages by a person who had been ejected from a street car on the ground that the time indicated on a transfer ticket within which it should be used, had expired, evidence that a fellow passenger had stated to the conductor that he had seen the plaintiff get off one car and take the first passing car, it being the one they were on, was inadmissible, as it did not form a part of the *res gestæ*, and was merely hearsay.

EVIDENCE — WAIVER. — Defendant's objection to the admission of such evidence was not waived by an endeavor to rebut it.

APPEAL from judgment, Supreme Court, Trial Term, Erie County, in favor of plaintiff.

PORTER NORTON, for appellant.

WILLIAM B. HOYT, for respondent.

FOLLETT, J. — This action was begun January 30, 1897, to recover damages for a personal injury alleged to have been inflicted October 7, 1896, by the defendant's employees, in ejecting the plaintiff from one of the defendant's cars for refusing to pay his fare. The plaintiff, on entering the car, presented a transfer ticket, which the conductor refused on the ground that the time within which it was good, as indicated on its face, had expired. A controversy arose between the plaintiff and the conductor of the car over the question as to whether his transfer was late, and it resulted in the ejection of the plaintiff (1). The plaintiff was permitted to testify that a man sitting on the right side of the car told the conductor and motorman that they had no right to eject him from the car or put hands on him; that the man said that he saw the plaintiff get off the Niagara street car and take the Elk street car (on which the plaintiff was riding); and that he advised the conductor and motorman that they were taking the law in their own hands, and that it was not just. This evidence was objected to as incompetent, as hearsay, and that the witness should be produced. The objection was overruled, and the defendant excepted. After the evidence was taken, the

1. For actions relating to EJECTION OF PASSENGERS, chronologically arranged from earliest period to 1896, and placed in alphabetical order of States, see 8

Am. Neg. Cas. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

defendant moved to strike it out, which motion was denied, and the defendant excepted. By this ruling the plaintiff was allowed to show that this man stated that he saw the plaintiff get off the Niagara street car, on which the transfer was given, and take the Elk street car; and, more, the plaintiff was allowed to show that in the opinion of this man, who claimed to know the facts, the conductor had no right to refuse to honor the transfer. This was clearly error, and one well calculated to prejudice the defendant's case before the jury. The declaration of this unknown man was not confined to what occurred at the time of the affray, but it related to a previous occurrence. It was to the effect that he saw the plaintiff leave the Niagara street car, and take, a few minutes later, the first Elk street car. Whether the plaintiff did take the first passing car was the principal question in issue. This declaration in respect to a past fact was not so connected with the transaction as to form part of the *res gestæ*. Undoubtedly, it was competent to prove that the plaintiff told the conductor at the time that he took the first passing car after receiving his transfer; and, if a witness had been produced who knew that fact, it would have been competent for him to testify that he told the conductor that the plaintiff took the first passing car after receiving his transfer. This would have been competent, as tending to show that the plaintiff was acting within his right, and for the purpose of showing that the defendant's agent had notice that the plaintiff claimed to be acting within his right. But this falls far short of rendering it competent for the plaintiff to testify that an unknown person standing by told the conductor that the plaintiff took the first passing car, which related to a past transaction. The declaration of this man that the plaintiff took the first passing car after the transfer was given was not the best evidence, but was mere hearsay, and wholly incompetent. *Waldele v. Railroad Co.*, 95 N. Y. 274; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Steph. Dig. Ev.* (Chase's 2d ed.), art. 3, and cases cited. This was not a statement of a third person characterizing an act occurring at the time, but was a statement of an alleged past act. The defendant did not waive his objection to this incompetent evidence by showing that no such statement was made by a man sitting or standing near the plaintiff. *Martin v. Railroad Co.*, 103 N. Y. 626, 9 N. E. Rep. 505.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

DEAN V. THIRD AVENUE RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
November, 1898.*

PASSENGER INJURED WHILE ATTEMPTING TO BOARD STREET CAR THAT WAS TEMPORARILY STOPPED AND THAT HE HAD NOT SIGNALLED. — Where it appeared that the plaintiff's intestate attempted to board a street car and was thrown off and received injuries from which he died, and the plaintiff's evidence showed that the car was stationary at the time the intestate attempted to board it, because of an obstruction on the track, and the defendant's evidence showed that the car was not stopped until after the accident, and the conductor testified that he saw the intestate "make for the car," a charge of the court that liability might be imputed to the defendant if the conductor, in the exercise of reasonable care, ought to have seen whether or not any one was about to get on the car while it was temporarily stopped by reason of the obstruction in front of it, was correct (1).

APPEAL from judgment, Supreme Court, Trial Term, Kings County, entered on verdict in favor of plaintiff.

HERBERT R. LIMBURGER, for appellant.

WILLIAM G. COOKE, for respondent.

WILLARD BARTLETT, J. — The plaintiff's intestate, William H. Dean, came to his death as the result of an accident on the defendant's line at the curve thereof in Park Row, in the city of New York, on the afternoon of the 14th day of April, 1897. He was thrown to the ground from the step of a moving car with such force as to inflict injuries from which he died nine days later. According to the testimony introduced in behalf of the plaintiff, the car had stopped on the curve because there was a wagon in front of it, loaded with rolls of paper, which impeded its progress for the time being. While the car was thus stationary, Mr. Dean approached to board it, and had placed one foot on the step, when the car moved on suddenly, and in consequence of such motion he fell off, with the result which has been stated. On the other hand, the evidence in behalf of the defendant tended to show that Mr. Dean attempted to board the car while it was in motion, and that it never came to a stop at

1. For actions relating to **PERSONAL INJURIES SUSTAINED** while **ALIGHTING** from or **BOARDING TRAINS, STREET CARS, ETC.**, decided in the several State and Federal courts, from the earliest period to 1896, see vols. 2-7,

Am. Neg. Cas., where the same are arranged in alphabetical order of states. The *New York cases* appear in vols. 5 and 6 Am. Neg. Cas. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

all until after the accident. The proof for the plaintiff contains nothing to show that the intention or desire of Mr. Dean to take passage on the car was communicated to the conductor, who was stated by one of the plaintiff's witnesses to have been just going inside the car at the time of the accident; but that the conductor actually did see the plaintiff is shown by his own account of the occurrence as follows:

"I remember passing the starter's booth at the time of the accident. I saw the man make for the car and the car in motion. I hollered to him to look out for himself. He got on, his two feet on the step, and his hand slipped off the hand rail, and he fell, and his head struck the ground first. I saw him jump on the car while it was in motion as it was passing around the starter's booth."

Recognizing the rule that a street-railway company must give an intending passenger a reasonable time to board a car, counsel for the appellant argue that this rule applies only to regular stopping places or crossings, and to cases in which the employees of the defendant have actual notice that there is an intending passenger who is attempting to board the car. In other words, they contend that it was incumbent upon the plaintiff in this case to show that some employee of the defendant had notice of the fact that the decedent desired to board the car. The learned judge before whom the case was tried took a different view of the law, and instructed the jury, in substance, that liability might be imputed to the defendant if the conductor, in the exercise of reasonable care, ought to have seen whether or not any one was about to get on the car while it was temporarily stopped by reason of the obstruction in front of it. I am strongly inclined to think that he was right. Such seems to have been the view of the obligations of a street railway company, under similar circumstances, entertained by the general term of the Third department in the case of *Losee v. Railroad Co.*, 63 Hun, 404, 18 N. Y. Supp. 297 (1). There the plaintiff claimed to have been hurt by the starting of the car in which she was a passenger after she had arisen from her seat to leave the car, and the general term said:

"It was for the jury to say, not only whether the plaintiff was standing up to change her seat, or to leave the car, but also whether the conductor should have seen her, in the absence of any signal, and whether his act in starting the car when she was standing up was or was not wrongful."

In support of the position of the defendant on this branch of the

1. *Losee v. Watervliet Turnpike & R. R. Co.*, 63 Hun, 404, is reported in 5 Am. Neg. Cas. 524.

case we are referred to *Railway Co. v. Robinson*, 68 Miss. 643, 10 Southern Rep. 60, and *Pitcher v. Railway Co.*, 154 Pa. St. 560, 26 Atl. Rep. 559 (1). In the first case cited the plaintiff succeeded, by means of a signal, in stopping a steam railway train at night at a point where it was not accustomed to stop, and was in the act of stepping on board, when the train suddenly started, severely injuring his knee. The Supreme Court of Mississippi held that he could not recover for the injury if his purpose to take passage was unknown to the conductor and other trainmen. In the Pennsylvania case a street car had stopped to let a passenger pass out from the rear door. The plaintiff's minor son attempted to board the front platform, and, as he was about to place his foot upon the step, the car started, throwing him under the wheel. He had given no signal to either the conductor or driver of his purpose to enter the car, and it did not appear that he was seen by either of them. Upon the trial plaintiff was nonsuited, and the judgment of nonsuit was affirmed by the Supreme Court. "It was the plain duty of the boy," said Mr. Justice Green in this case, "to give some notice of his intent to become a passenger, and until he did so the defendant was not guilty of any negligence in simply not knowing of such intent." Although I am not prepared to question the correctness of the results reached in these cases in view of the particular facts of each, it seems to me that we can hardly hold that the persons operating street cars in our great cities are not under some obligation to anticipate that intending passengers may get on board, or attempt to get on board, when the cars are stopped by reason of temporary obstructions, or for any other cause, at places where stops are not ordinarily made. However this may be, the jury in the present case were authorized to take a view of the facts which would bring it within the rule laid down in Mississippi and Pennsylvania, for the passage which we have quoted from the testimony of the conductor, if believed, shows that he was made aware of Mr. Dean's intention and effort to get on board the car. When a witness says that he saw a man "make for" a car, he means that the man was trying to board the car, if he means anything. The jury may have believed him to this extent, and yet have discredited his statement that the car was in motion at the time. I think the judgment should be affirmed.

Judgment and order affirmed, with costs. All concur.

1. *Pitcher v. People's Street R'y* quent decision in same case, 174 Pa. Co., 154 Pa. St. 560, is reported in 6 St. 402, 6 Am. Neg. Cas. 372. Am. Neg. Cas. 368. See also subse-

DORNEY V. O'NEILL.

*Supreme Court, New York, Appellate Division, First Department,
November, 1898.*

MASTER AND SERVANT — ASSUMPTION OF RISK. — A servant who is obliged to pass to and from his work, through a passageway in which he knows the master regularly stored trucks, assumes the risk incident to their presence, and cannot recover damages for injuries sustained in colliding with one of the trucks so stored.

SAME — UNLIGHTED PASSAGEWAY. — The fact that at the time of the collision the passageway was in darkness owing to the electric lights being suddenly extinguished, will not render the master liable without proof that the fault was his or directly imputable to him.

APPEAL from judgment, Supreme Court, Trial Term, New York County, in favor of plaintiff.

EUGENE LAMB RICHARDS, JR., for appellant.

CHARLES STECKLER, for respondent.

McLAUGHLIN, J. — This is an appeal from a judgment entered upon the verdict of a jury, awarding to the plaintiff \$3,200 damages for personal injuries, and from an order denying a motion for a new trial. The plaintiff was an employee of the defendant, and at the time of the accident was working in the basement of the defendant's store. In going to and from his place of work it was necessary for him to walk through a hall or passageway many feet in length, and from five to six feet in width. This passageway was lighted by nine incandescent electric lamps placed at intervals along its entire length. These lamps were operated and controlled by three separate switches; those designated in the evidence, 1, 2, 3, 4, and 5 by one switch; 6, 7, and 8 by another; while 9, which was located at the end of the passageway, and about ninety feet from where the plaintiff was injured, by still another. At the close of each day's work a signal was given, by the striking of a bell, for defendant's employees to quit work, and leave the building, and when this signal was given lights 1 to 5 were extinguished, and as soon as the employees had left the building the remaining lights were extinguished, except 9, which was kept burning night and day. On the day of the accident the signal to quit work was given, lights 1 to 5 were extinguished, and the plaintiff started to leave the building, but before he had passed entirely through the passageway all the lights went out, and in attempting to proceed in the darkness he ran into a box or basket on wheels, designated in the evidence a "wheeler," stored in the

passageway, and sustained a very serious injury. The recovery obtained by him is attempted to be sustained upon the ground that the defendant was negligent, 1, in storing the "wheeler" in the passageway, and, 2, in not having the passageway sufficiently lighted. It appeared upon the trial, and the fact was not contradicted, that it had been the custom of the defendant, during all the time that the plaintiff had been in his employ, which was about two years, to store "wheelers" in the passageway, and that the plaintiff knew it. He himself testified that the "wheelers" were generally standing in the passageway every night. The risk, therefore, of walking through the passageway by reason of the "wheelers" being there stored, was one which the plaintiff assumed, since it was incident to his employment. The defendant had the right to use the passageway for such purposes as he saw fit in connection with his business, and if the storage of the "wheelers" there was a source of danger to the plaintiff, and the plaintiff knew of it, by continuing in defendant's service, having such knowledge, he also assumed the risk. The rule is well settled that the servant assumes, not only the risk incident to his employment, but also all dangers which are obvious and apparent, and if he enters into or continues in the service, having knowledge of the danger involved, he is in law deemed to assume the risk, and to waive any claim for damages in case of injury. *Sweeney v. Envelope Co.*, 101 N. Y. 524, 5 N. E. Rep. 358; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. Rep. 286; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. Rep. 648; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. Rep. 986. The recovery cannot be sustained upon this ground, nor do we think it can be sustained upon the ground that the defendant was negligent in not sufficiently lighting the passageway. It is conceded that the plaintiff provided, in the first instance, a proper system for lighting the passageway, and supplied a sufficient number of lamps for that purpose. These lamps, so far as appears, had never before failed to accomplish the purpose for which they were intended, and the extinguishment of all of them was in direct violation of defendant's orders. Lamps 6, 7, and 8 were not to be extinguished until the employees had left the building, while lamp 9 was to be kept burning day and night. Why were these lamps extinguished on the evening in question? What caused them to go out? Was it by reason of the negligence of the defendant or of a co-servant? Was it due to some defect in the system for which the defendant was liable, or was it due to some agency over which he had no control? A correct answer to these inquiries cannot be obtained from the record before us. Before the plaintiff was entitled to recover, it was necessary for him to establish personal fault on the part of the

defendant, or what is equivalent thereto; and until he had done that the defendant was entitled to the benefit of the presumption that he had performed his duty. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. Rep. 339. The accident was an unfortunate one, and the plaintiff was very seriously injured, but this of itself did not entitle him to recover. Before he could do that, it was necessary to establish facts from which it could be fairly said, under well-recognized rules of law, that his injuries were due to some wrongful act, either of omission or commission, of the defendant.

It follows that the judgment must be reversed, and a new trial granted, with costs to the defendant to abide the event.

VAN BRUNT, P. J., and PATTERSON and INGRAHAM, JJ., concur.

O'BRIEN, J. (dissenting). — I think there was sufficient evidence to carry the question of defendant's negligence to the jury. The plaintiff was entitled to have the only passage or mode of egress from the building provided for him and the other employees of this large establishment made and kept reasonably safe. That the injuries were caused by the failure to keep the passageway lighted is not in dispute. Having shown, therefore, the master's duty to his employees with respect to the premises, and having presented evidence from which the inference might be drawn that this duty was not observed on the night of the accident, and that he suffered injuries as the result thereof, I think the plaintiff made out a *prima facie* case, and was entitled to go to the jury upon the question of defendant's negligence. It is not suggested that plaintiff was guilty of contributory negligence, or that the amount of damages awarded was excessive. I think, therefore, that the verdict should be sustained, and the judgment entered thereon affirmed, and dissent from the conclusion reached by the majority of the court.

Judgment reversed.

BECKER V. ALBANY RAILWAY.

*Supreme Court, New York, Appellate Division, Third Department,
November, 1898.*

DAMAGES FOR PERSONAL INJURIES BY MARRIED WOMAN — EXCESSIVE VERDICT. — In an action for damages for injuries sustained by a married woman through the negligence of the defendant, a verdict for \$10,000 was excessive where her injuries were not shown to be permanent, and there was no satisfactory evidence as to how long she would continue

to suffer therefrom, and not being entitled to recover for loss of earnings or for medical attendance (1).

APPEAL from judgment of Supreme Court, Trial Term, Albany County, entered in favor of plaintiff upon verdict of a jury for \$10,000.

ROSENDALE & HESSBERG (S. W. ROSENDALE, of counsel) for appellant.

MARK COHN, for respondent.

PUTNAM, J. — After an examination of the evidence in this case, we reach the conclusion that it was sufficient to authorize the jury to find that the injury to the plaintiff, to recover damages for which this action was brought, occurred in consequence of the negligence

1. *The following is a list of cases in other jurisdictions in which the verdicts have been reduced upon appeal:*

Little Rock & Ft. S. R. Co. v. Barker, 39 Ark. 491; \$3,500, remittitur of \$1,235 required; (child killed by train).

St. Louis, I. M. & S. R. Co. v. Robbins, 57 Ark. 377; \$7,500, remittitur of \$3,500 required; (brakeman killed on railroad).

Hennessey v. Dist. of Columbia, 8 Mackey (D. C.) 220; \$3,000, remittitur of \$1,500 required; (injured on sidewalk).

Flannery v. Balt. & O. R. Co., 4 Mackey (D. C.) 111, 8 Am. Neg. Cas. 115; \$5,000, remittitur \$3,500; (assault on passenger).

Sherman v. Western Stage Co., 24 Iowa, 515; \$8,000, remittitur of \$3,000 required; (death of passenger).

Collins v. Council Bluffs, 35 Iowa, 432; \$15,000, remittitur of \$5,000 required; (injury from defective sidewalk).

Rose v. Des Moines Valley R. Co., 39 Iowa, 246; \$10,000, remittitur of \$5,000 required; (injury to passenger).

Cooper v. Mills Co., 69 Iowa, 350; \$25,000, remittitur of \$10,000 required; (injured by fall of bridge while driving over it).

McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314; \$12,000, remittitur of \$5,000 required; (passenger ejected and injured).

Lombard v. Chicago, R. I. & P. R. Co., 47 Iowa, 494; \$4,000, remittitur of \$1,500 required; (employee's leg broken).

Kroener v. Chicago, M. & St. P. R. Co., 88 Iowa, 16; \$12,000, remittitur of \$4,000 required; (loss of foot by brakeman while coupling cars).

North Chicago St. R. Co. v. Wrixon, 150 Ill. 532, aff'g 51 Ill. App. 307, 2 Am. Neg. Cas. 708; \$5,000; remittitur required of \$2,500; (death, alighting from street car).

Missouri Pac. R. Co. v. Dwyer, 36 Kan. 59; \$10,000, remittitur required, \$3,000; (loss of leg below knee by brakeman).

Benagam v. Plassau, 15 La. Ann. 703; \$5,000, remittitur required, \$2,000; (loss of eye from discharge of cannon).

Peyton v. Texas & P. R. Co., 41 La. Ann. 861; \$25,000, judgment reduced to \$5,000; (injury to hip joint).

Lampkins v. Vicksburgh, S. & P. R. Co., 42 La. Ann. 979; \$7,500, reduced to \$4,500; (passenger ejected).

Bomar v. La., N. & S. R. Co., 42 La. Ann. 983; \$15,000, reduced to \$2,000; (loss of arm by conductor).

Black v. Carrollton R. Co., 10 La. Ann. 33; \$10,000, reduced to \$5,000; (both legs of passenger broken).

Howard v. Grover, 28 Me. 97; \$2,000, remittitur required of \$500; (malpractice).

Hutchins v. St. Paul, M. & M. R.

of the defendant, that the plaintiff was free from contributory negligence, and that the various exceptions taken by defendant to rulings of the trial judge, to his charge, or refusals to charge, do not require us to grant a new trial. But we are of the opinion that the defendant's motion for a new trial, on the ground that the verdict rendered by the jury was for excessive damages, should have been granted. The plaintiff was not entitled to recover for the loss of earnings, for medical attendance, or the expenses of her sickness. She was only entitled to damages for the pain and suffering she had

Co., 44 Minn. 5; \$3,500, remittitur of \$1,500 required; (death of employee).

Finch v. Northern Pac. R. Co., 47 Minn. 36, 8 Am. Neg. Cas. 450n; \$650, voluntarily reduced to \$500; remittitur of \$250 more required; (ejection of passenger for refusing to pay extra fare).

Holmes v. Atchison, T. & S. F. R. Co., 48 Mo. App. 79; \$1,500, remittitur of \$300 in trial court; (injury to fireman on railroad).

Waldhier v. Hannibal & St. J. R. Co., 87 Mo. 37; \$25,000; third trial refused upon plaintiff offering to remit \$5,000; (loss of foot and leg by brakeman).

Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 374; \$5,000, plaintiff offered to remit \$1,500 in Supreme Court and new trial refused; (death of employee).

Kennon v. Gilmer, 5 Mont. 257, 4 Am. Neg. Cas. 820, 823; \$20,750, reduced to \$10,750; (passenger jumping from stage coach in peril and breaking leg). Upon appeal to U. S. Supreme Court, 131 U. S. 22, 4 Am. Neg. Cas. 823, it was held error to have reduced the verdict without making the order in the alternative to remit or take a new trial; on the second trial, 9 Mont. 108, 4 Am. Neg. Cas. 823, \$20,750, remittitur of \$14,837 required.

Orleans Village v. Perry, 24 Neb. 831; \$5,000, remittitur of \$2,000 required; (injury to right arm from falling into excavation in sidewalk).

Sioux City & P. R. Co. v. Finlayson,

16 Neb. 578; \$9,250, remittitur of \$3,000 required; (concussion of spinal cord of engineer, caused by explosion of locomotive boiler).

Fremont, E. & M. V. R. Co. v. Leslie, 41 Neb. 159; \$5,000, remittitur of \$2,350 required by trial judge, remittitur of \$1,450 more required on appeal; (employee, while on top of pile driver, injured by its fall).

Belknap v. Boston & M. R., 49 N. H. 358; \$1,635, remittitur of all but \$200 required; (assault and ejection of passenger for refusal to pay fare after he had offered special ticket that was refused by conductor of train).

Brown v. So. Pac. Co., 7 Utah, 288; \$12,000, remittitur of \$2,000 required by trial court, and of all but \$4,000 by court on appeal; (amputation of left hand of brakeman injured while coupling cars).

Mahood v. Pleasant Valley Coal Co., 8 Utah, 85; \$4,000, remittitur of \$1,000 required; (employee's little finger and the one next to it broken while endeavoring to put block on track to stop runaway car).

Cunningham v. Seattle Elec. R'y & P. Co., 3 Wash. 471; \$1,500, remittitur of \$1,000 required; (passenger ejected from street car).

Coggsell v. West St. & N. E. Elec. R'y Co., 5 Wash. 46; \$7,000, remittitur of \$2,000 required; (injury to knee of passenger standing on running board of street car, by board alongside track hitting him).

endured, and for that which it was reasonably certain she would endure in the future. The trial occurred about nineteen months after the injury was received, and the plaintiff testified that during that period she had endured much pain and suffering. The evidence also authorized the jury to find that the injury sustained by the plaintiff resulted in a disease of the nervous system, known as "neurasthenia." On the question as to how long the plaintiff's condition would continue, Dr. Boice said, in answer to the question:

"Can you say with reasonable certainty as to how long the plaintiff will continue to suffer from the injuries that she has sustained? A. I couldn't say. I couldn't answer that question. * * * I couldn't say definitely. Might be a full and complete recovery, possibly, in a short time, and might not. It is impossible to determine that fact. My opinion wouldn't be, within a week. Within a reasonably short time. I couldn't tell."

Dr. McDonald, speaking of those suffering from neurasthenia, said:

"I have known them to get well in a year, and then I have known them to last on an interminable time; then six or seven years, and stretch up to about six years. I would say the majority of them get well in about that time. I know of a case where there hasn't been a complete recovery in six years. Some go on for all time; they are going on yet. In one to six years a majority get well, but a number do not."

Dr. Ward's opinion was as follows:

"I think the chances for her recovery are very good. Q. What is your opinion as to the likelihood of her full and complete recovery? A. I don't think any one could fix a date. I should think any time between three months and three years after this matter is settled, and she has got it off her mind, she might get well."

Dr. Wiltsie testified as follows:

"Q. What do you say as to whether Mrs. Becker's injuries are permanent or not? A. I should say the chances were, they were not. Q. You mean by that in your opinion they are not permanent? A. Yes, sir. Q. That is your opinion? A. That is my opinion. Q. What do you say as to the likelihood of her recovery? A. I think her chances to recover are very good. Q. As to the time, what can you say? A. In most of those cases they recover from one to three years. Those are the statistics given by Dana and specialists on nervous diseases."

It will be seen that neither of the physicians testified that the injury received by the plaintiff would be permanent, or expressed an

opinion as to how long she will suffer therefrom, although testifying that those suffering from neurasthenia in a majority of cases recover in from one to six years. The jury was therefore authorized to find that the plaintiff, in consequence of the negligence of the defendant, had received an injury that had caused her pain and suffering for the period of nineteen months, and that she would continue in the same condition for some undetermined time in the future. In such a case, the plaintiff not being entitled to recover damages for a loss of earnings and for expenses of sickness and for medical attendance, her injuries resulting from the defendant's negligence not appearing to be permanent, and there being no satisfactory evidence as to how long she would probably continue to suffer therefrom, we are of opinion that the amount awarded by the jury was excessive. We doubt whether, in any well-considered authority, such a recovery, under such circumstances, has been approved. Even in those cases where damages were sought to be recovered for permanent injuries, unless extraordinary or peculiar ones, a verdict for such an amount as was rendered by the jury in this case has seldom been sustained. In *Morris v. Railroad Co.*, 68 Hun, 39, 22 N. Y. Supp. 666, where, owing to the negligence of the defendant, the plaintiff was injured, and his leg amputated, a recovery was had for \$9,000. This was reduced by the General Term of the First Department to the sum of \$5,000. In *Vail v. Railroad Co.* (City Ct. Brook.) 26 N. Y. Supp. 59, a verdict of \$7,500 was sustained. In that case the injury for which a recovery was had was permanent and unusual, and the plaintiff was entitled to recover for loss of earnings and for medical and other expenses. In *Thomas v. Railway Co.*, 18 App. Div. 185, 45 N. Y. Supp. 920, a recovery of \$7,500 was suffered to stand. In consequence of the injury received by the plaintiff, his leg was shortened. He was entitled to recover for loss of earnings, and the accident permanently affected his earning capacity. In *Coppins v. Railroad Co.*, 48 Hun, 292, the plaintiff recovered a judgment of \$13,500. In consequence of the injury received, his leg was shortened, and he was compelled to pay \$750 for medical attendance. The recovery was reduced by the General Term of the Fourth Department to the sum of \$7,000. The opinion of Hardin, J. (pages 300-303), contains a review of several authorities bearing on the question as to the amount of damages that should be awarded in such cases. In *Murray v. Railroad Co.*, 47 Barb. 196, cited by Hardin, J., in his opinion in the case last cited, where the plaintiff lost his hand as a result of the injury for which the action was brought, a judgment was obtained for \$8,000. This was reduced by the General Term to \$6,000. In *Jennings v. Van*

Schaick, 13 Daly, 7, a recovery for \$10,000 was set aside as excessive. One of the physicians sworn on the trial of the case testified to the permanency of the injuries of the plaintiff, for which she claimed damages. In the opinion in the case cited it was said:

“Where a verdict is much above or much below the average, it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray.”

It will be observed in each case above cited that the injury was permanent, or may have been found such by the jury, and loss of earnings and expenses for medical attendance was an element of damages awarded. In view of the amount of damages in actions for personal injuries held allowable in the well-considered cases to which we have referred, where the injury was permanent, and loss of earnings and expenses of medical attendance entered into the recovery, it is apparent, we think, that in the case under consideration — the plaintiff not being entitled to recover for a loss of earnings or for medical attendance, her injuries not being permanent, and there being no satisfactory evidence as to how long she will continue to suffer therefrom — the verdict of the jury, awarding the plaintiff the sum of \$10,000, was for much too large a sum. The case of *Lockwood v. Railway Co.* (Com. Pl.) 7 N. Y. Supp. 663, in which the plaintiff brought an action to recover damages for personal injuries sustained by her in consequence of negligence on the part of the defendant, presents features somewhat similar to the one under consideration. The plaintiff in that case was a married woman, and obtained a judgment against the defendant for \$10,000 for an injury to the sciatic nerve, and for inflammation of a broad ligament that sustains the uterus, accompanied by obstinate constipation, suppression of menstruation, and nervous prostration. She suffered considerable pain and a great deal of inconvenience — suffered when she walked, and was not strong enough to do work. The court in that case held that the verdict for \$10,000 was not reasonable, and reversed the judgment, unless the plaintiff would stipulate to reduce the damages to \$4,000.

The judgment and order should therefore be reversed, and a new trial granted, with costs to abide the event, unless the plaintiff stipulates, within twenty days after the entry of the order, to reduce the amount of damages to the sum of \$4,000, in which case the judgment (as modified) and order are affirmed, without costs of the appeal to either party. All concur.

SAVAGE V. GERSTNER.

*Supreme Court, New York, Appellate Division, Second Department,
January, 1899.*

LAW OF THE ROAD — PEDESTRIANS. — The provision of the revised statutes, vol. 1, (9th ed.), p. 716, § 157, requiring persons in carriages meeting on highways to turn to the right does not apply to the case of a person in a carriage meeting a person on foot.

SAME — ONE TEAM OVERTAKING AND PASSING ANOTHER. — There is no law of the road that requires a team meeting a pedestrian to turn to the right, or that one team overtaking another must turn to the left when passing.

PEDESTRIAN RUN OVER BY VEHICLE ON LEFT SIDE OF STREET. — The driver of a vehicle has the legal right to drive in any part of the street, and the fact that a person was run over while the vehicle was being driven on the left side of the street will not render the owner liable.

APPEAL from judgment, Supreme Court, Trial Term, Queens County, in favor of plaintiff.

L. SIDNEY CARRERE, for appellant.

L. B. TREADWELL, for respondent.

GOODRICH, P. J. — The plaintiff left the court house in the city of New York about four o'clock in the afternoon of November 3, 1897, and walked to Broadway. He intended to take the elevated road, to go up town, and for this reason was about to cross Broadway. He testified: "As soon as I stepped up off the sidewalk, down came this vehicle down Chambers street, coming down on the left-hand side when it should have been on the right-hand side, and struck me." The complaint has no such allegation. It simply alleges that "he was, without cause or provocation, run into and knocked down with great force and violence by a horse and wagon of defendant, which was being driven by one of defendant's employees on said Broadway, in a careless and negligent manner and at a fast and unsafe rate of speed." The action was based on the negligence of the defendant's servant, and the court properly submitted to the jury the question whether the plaintiff was acting prudently in attempting to cross Broadway. Upon the question of the defendant's negligence, the learned judge called attention to the testimony given by the driver. The latter testified that he was proceeding on Chambers street, towards the North river, and that he came into Broadway from the left-hand side (that is, the southerly side) of Chambers street; that there was a blockade at the corner, and that

he tried to cross over the street (Broadway), when the plaintiff, who was attempting to board a street car, backed up against his horse and was thereby thrown to the ground. There was evidence contradicting the driver's statement that there was a blockade and that the plaintiff was attempting to board a street car. There was no exception by either party to the body of the charge, but "the jury returned into court and asked whether a person driving on the left-hand side is lawfully there or not. The Court: The law of the road, gentlemen, in this country, is to go to the right. That is the general law. When you are on the road, keep to the right, except, when you come up in the rear and overtake anybody, you pass to the left. Now, sometimes, in crowded places, you cannot keep to the law of the road, and there the rule of ordinary prudence and common sense must govern. Sometimes you have to get off the right side to go to the left for some reason, and when you have to it is allowable to do it. Defendant's Counsel: I except to the statement of the law of the road." We think this statement of the law was incorrect and calculated to mislead the jury. I find no authority in the decisions of our courts which requires a person approaching from the rear and overtaking any person to pass to the left. The only statutory provision on the general subject is that found in 2 Rev. Laws 1813, p. 283, § 41, which is substantially the same as the present provision found in 1 Rev. St. (9th ed.), p. 716, § 157. This latter provision reads as follows:

"Whenever any persons traveling with any carriages shall meet on any turnpike road or highway, the persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit such carriages to pass without interference or interruption, under the penalty of five dollars for every neglect or offense, to be recovered by the party injured."

But this applies only to persons traveling in carriages or other vehicles and meeting other persons traveling in carriages or other vehicles, and does not apply to the case of a person in a carriage meeting a person on foot. *Dudley v. Bolles*, 24 Wend. 465, was an action to recover damages occasioned by a collision between a mule drawing a cutter and a person riding on horseback. The court said (page 472):

"There is no law of the road requiring a man on horseback, when meeting a horse or vehicle, to turn out on the right or left side. The rider must govern himself in this respect according to his notions of prudence at the time, under the circumstances."

In an opinion by Mr Justice Hatch in *Newman v. Ernst* (Super. Ct. Buff.), 10 N. Y. Supp. 310, it was said:

"The statute provides a penalty for a person driving upon the roadway, and about to meet a passing team, who does not turn to the right of the center of the road. *Earing v. Lansing*, 7 Wend. 185. But such statute does not provide, *per se*, that an offender shall be liable for all damage which may happen while there. While it may be legal negligence for him to be there, his liability must depend upon the rules of law applicable to cases of negligence. *Simmonson v. Stilenmerf*, 1 Edm. Sel. Cas. 194; *Brooks v. Hart*, 14 N. H. 307; *Parker v. Adams*, 12 Metc. (Mass.) 416; *Palmer v. Barker*, 11 Me. 338."

The case at bar must rest on the evidence of the negligence of the defendant. In this view it is to be observed that footmen have no right of way, at a crossing in a city street, superior to that of vehicles. Each has the right of passage in common, and in the use of this right is bound to exercise reasonable care for his own safety and to avoid doing injury to others who may at the same time be in the use of their right of way. *Barker v. Savage*, 45 N. Y. 191. The defendant's driver had a legal right to be in any part of the street, and as long as he was not negligent in driving it cannot be said that his position, or the course which he was driving, rendered the defendant liable; and yet the jury were not fairly instructed as to the effect of the law of the road as stated by the court upon the case submitted to them. We have had some doubts whether the exception was stated as fully and carefully as it ought to have been, but it is difficult to say that the attention of the court was not properly called to the error. The defendant's counsel excepted "to the statement of the law of the road." Certainly this can be construed as relating both to the correctness of the statement of the law and also to its applicability to the issues. At any rate, the instruction seems to us to have worked an injustice to the defendant, within the rule stated in *Howell v. Manwaring*, 3 N. Y. St. Rep. 454, affirmed without opinion in 118 N. Y. 682, 23 N. E. Rep. 1147, and *Maier v. Homan*, 4 Daly, 168. The judgment and order must be reversed.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

HEFFERNAN v. ALFRED BARBER'S SON.

*Supreme Court, New York, Appellate Division, First Department,
January, 1899.*

LAW OF THE ROAD. — A driver of a coal cart on the left side of a street near the coal yard that he desired to enter is bound to turn to the right to allow another cart to pass though the driver of the latter was aware of the former's intention.

SAME — COLLISION IN ENDEAVORING TO PASS TO LEFT, WHEN UNABLE TO PASS TO RIGHT. — Where two coal carts met in the street, both on the same side and going in opposite directions, and the one that was on the left side refused to turn to the right to allow the other to pass, and the other then attempted to turn to the left, and a collision occurred, the questions of whether the latter was negligent in not turning out sooner than he did, whether his position on the driver's seat caused him to miscalculate the distance between the hubs of the two carts and whether he did the best he could under the circumstances, were for the jury.

APPEAL from judgment, Supreme Court, Trial Term, New York County, in favor of plaintiff.

ARTHUR C. PALMER, for appellant.

M. P. O'CONNOR, for respondent.

BARRETT, J. — The action was for damages which the plaintiff sustained as the result of a collision between two coal carts. The plaintiff was driving the one; one Begley, a driver of the defendant's, the other. The collision occurred in Water street, between Oliver street and James Slip. The plaintiff was going in a southwesterly direction, and was on the northwesterly side of the street. Begley turned into Water street from South street, up James Slip. This brought him into Water street heading in a northeasterly direction, and he proceeded on the left side of that street, contrary to the rule of the road. The drivers called out to each other to change their course. The defendant's coal yard was in Water street, on its southeasterly side, and Begley testified that he requested the plaintiff to swing his cart over a little to the left, so as to give him (Begley) a chance to turn in to this coal yard. The plaintiff, it is claimed, knew where the defendant's coal yard was, and that Begley was going there. He, however, desired that Begley should keep to his own side of the road; and it was not until he perceived that Begley persisted in keeping to the left, and thus precipitating a collision, that he turned in the other direction, — that is, to his left. Begley throughout kept right on in his original

direction, thus forcing his cart in between the plaintiff's cart and the curb, where, in the end, the hubs of the two carts collided. The defendant contends that the collision resulted from the plaintiff's refusal to turn out sooner than he did, and also from the fact that the plaintiff was sitting on the left of the driver's seat of his own cart, and that this prevented his seeing the hubs of the two wagons, and caused him, when he finally turned out, to miscalculate the distance of safety.

The least that can be said upon all these questions of fact is that they were for the jury. Begley was apparently in the wrong throughout. No matter where his master's coal yard was, he had no right to violate the rule of the road, and to force the plaintiff, at the risk of a collision, to turn out for him. The plaintiff had a perfect right to pursue his lawful course, and he acted with great moderation in submitting, as he did, to Begley's unwarranted demands. It was natural that he should submit reluctantly, and should delay to turn out until quite certain that Begley would not himself deviate from his course. The jury believed the plaintiff's story, as they were authorized to do. Whether Begley stopped, as he said he did; whether the plaintiff should have turned out sooner than he did; whether his position on the driver's seat caused him to miscalculate the distance between the hubs of the two carts; whether he did the best he could under the circumstances,—all these were, to say the least, questions for the jury; and we see no reason to disturb their verdict, embracing, as it necessarily did, an answer favorable to the plaintiff upon these and all other questions of fact.

Two exceptions were taken to the learned trial judge's rulings. They were to the refusal to charge the following propositions:

1. "If the jury believe that the plaintiff miscalculated to pass the defendant's cart, when he could in safety have avoided the collision, such calculation on his part defeats his recovery in this action."

2. "If the jury believe that the plaintiff had a plain, unobstructed view of the advance of the defendant's cart, for a long distance, and saw the direction which defendant's cart was taking, and plaintiff could have avoided the collision, it was not negligence on the part of the defendant's driver to keep upon the course which he was going prior to the collision."

The first of these propositions omitted all reference to reasonable care and prudence. In substance, it made the plaintiff a guarantor of the success of the calculation; in other words, that he must avoid the collision if it were possible to do so, not if it could be avoided with the exercise of reasonable care. The proposition also misapplied the rule as to miscalculation, when one who is in no

immediate peril places himself unnecessarily in the perilous situation, and takes the chances of getting through safely. If there was here a miscalculation, it was by one who was put in immediate jeopardy by the defendant's negligence, and who simply calculated how best to escape.

The second proposition is quite obscure. The premise bears upon the plaintiff's negligence; the conclusion upon the defendant's. It was certainly neither negligence nor care upon Begley's part, as matter of law, to keep on as he did merely because the plaintiff saw what he was doing and where he was tending. Begley might, as matter of fact, have been influenced by what he himself saw, or even by what he noticed that the plaintiff saw. But that was not the proposition. It was that if the plaintiff, from what he saw, could have avoided the collision, it was not negligence on Begley's part to keep on his course.

Both propositions were untenable, and were properly refused.

No other question is presented upon this appeal, except as to the amount of damages. There is no just foundation for the claim that they were excessive. The verdict for \$3,500 was certainly substantial. It was, perhaps, even large. But it was not excessive, under the governing rule upon that head.

The judgment and order appealed from should be affirmed, with costs. All concur.

MORRISON V. CHARLOTTE ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

Supreme Court, North Carolina, December, 1898.

PASSENGER ALIGHTING FROM STREET CAR WHILE FACING TO REAR. — One who, in alighting from an open car faced to the rear, and the car starting too soon, injured her, is not guilty of contributory negligence, if the car was not moving when she started to take the last step (1).

CONTRIBUTORY NEGLIGENCE. — Whether she was negligent in taking the last step while facing to the rear of the car after it had started, was for the jury.

1. For actions arising out of injuries sustained while ALIGHTING FROM OR BOARDING TRAINS, STREET CARS, ETC., from the earliest period to 1896, decided in the several State and Federal courts, see vols. 2-7, Am. Neg. Cas., where

the same are arranged in alphabetical order of States. The *North Carolina cases* are reported in 6 Am. Neg. Cas. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

APPEAL from judgment, Superior Court, Mecklenburg County, in favor of plaintiff.

BURWELL, WALKER & CANSLER and OSBORNE, MAXWELL & KEERANS, for appellant.

JONES & TILLET, for appellee.

FURCHES, J. — On the 12th of September, 1897, about 7 or 7:30 P. M., the plaintiff and her sister, Mrs. Grier, took passage on the defendant street railway, in the city of Charlotte. They notified the conductor that they wished to get off at Sixth street. The car stopped at Sixth street for ten or twelve seconds, when it started again, while plaintiff was in the act of getting off, and she was thrown on the ground or pavement and injured. There was no dispute or conflict in the evidence but what the car started to move while plaintiff was in the act of getting off, and that she was thrown to the ground, and injured by the fall. There was some conflict in the evidence as to where she was, and as to what position she occupied, when the car started to move. The plaintiff testified that she and her sister occupied the same seat; that her sister was nearest the side on which they wished to alight; that when the car stopped she at once arose and stood up, but waited for her sister to get off, before she moved to the side of the car where she wished to alight; that, as soon as her sister got off, she undertook to do so, and while she was on the "running board," and before she got on the ground, the car started, throwing her upon the ground, from which fall she received serious and permanent injuries. The defendant's evidence tended to show that she did not arise from her seat and stand up when the car stopped, and did not until the car started; that she had ample time to have gotten off; that she undertook to get off with her face towards the rear end of the car; and that her injury was caused by her own negligence, or, if her negligence was not the sole cause of her injury, that it contributed to her injury, was the proximate cause thereof, and that she cannot recover. This car was what is called an open car, in which the seats ran clear across the car, and the passengers alighted from the side. From the evidence, there was not more than a dozen passengers aboard, if that many.

The negligence of the defendant was not contested in the argument here. The finding of the jury on the first issue settled that question. But the defendant filed eleven lengthy prayers for instruction on the contributory negligence of the plaintiff, all of which it seems to us might have been reduced to two or three, if the learned counsel had had more time to prepare them. None of them were given by the court, except as they may be covered by the

charge. The defendant's counsel contended that the car stopped long enough for the plaintiff to get off, and, if she got hurt by the car's starting before she got off, it was her own fault,—negligence. The defendant also contended that she got off with her face turned the wrong way, and that this was her fault,—negligence; that these contributed to her injury, and were the proximate cause of the same.

It would be difficult to see how this could be so, from any view of the evidence, when it is admitted that she was injured by the car's starting while she was in the act of getting off. Even if it be admitted that ten or twelve seconds is sufficient time to allow a woman to get off the car, and that she did not move as quickly as she might have done, still the defendant was guilty of the grossest negligence in starting the car when she was getting off, in plain view of him. He must necessarily have seen her if he was paying attention to his duties; and if he was inattentive to these duties, and started the car without seeing her, he was guilty of gross negligence. This being so, and it being shown — admitted — that her injury was caused by starting the car, over which she had no control, it is difficult to see how the manner in which she was getting off contributed to, and was the proximate cause of, the injury, or that the length of time — ten or twelve seconds — could have contributed to, and have been the proximate cause of, the injury.

But the court charged the jury that, "if the plaintiff did not arise and start to get off before the signal to start the car was given, then, in no view, can you answer the first issue, 'Yes.' " The issues were as follows: 1. "Was the plaintiff injured by the negligence of the defendant? Ans. Yes." 2. "Did the plaintiff by her own negligence contribute to her injury? Ans. No." There was no objection as to the third issue. The court further charged the jury upon the second issue as follows: "It was the duty of the plaintiff, in her manner of stepping off the car, to exercise the care reasonably to be expected of a person of ordinary prudence under the circumstances, and a failure to observe such care was contributory negligence." "If the plaintiff stepped off in the opposite direction to that in which the car was moving, then, if the car was not moving as she started to take the last step, she was not negligent in stepping off in this manner. If the car was moving, it was for the jury to say whether, under the circumstances, in stepping off in the opposite direction, she failed to exercise the care of a person of ordinary prudence. If it was a failure to exercise ordinary care, the jury should answer the second issue, 'Yes.' " If the question of contributory negligence was presented by the evidence (and it

seems to us that it was not), the court has complied with the law in presenting it to the jury. *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. Rep. 426 (1), which has been since cited with approval in a number of cases. This case is very much like *Cawfield v. Railway Co.*, 111 N. C. 597, 16 S. E. Rep. 703 (2), except that the facts in this case are more favorable to the plaintiff than were those in that case. In that case (which was an open street car), the car stopped two minutes, and the conductor claimed that he did not see her getting off; and in that case, as in this, the defendant claimed that the plaintiff (Mrs. Cawfield) had time to have gotten off, and that it was her own negligence not to have done so, and that the conductor did not see her. But the court held that it was his duty to have seen her, and held the road liable. In that case Justice Clark dissented, and Shepherd, C. J., concurred in the dissenting opinion. But this dissent was not as to the merits of the case, but as to a question of abuse of privilege by counsel.

Affirmed.

WILLIS V. SECOND AVENUE TRACTION COMPANY.

Supreme Court, Pennsylvania, January, 1899.

PASSENGER JUMPING FROM STREET CAR TO ESCAPE IMPENDING

DANGER. — Where it appeared that an electric car in which plaintiff was a passenger had stopped at a railroad crossing, the gates being down, while a train was passing and the controller being out of order, and being examined by an inspector, the car suddenly started forward, broke through the gates, and struck the train, and the plaintiff was injured while endeavoring to jump from the car, the company was liable, though the other passengers who remained in the car were uninjured (3).

1. *Hinshaw v. Raliegh & Aug., etc., R. R. Co.*, 118 N. C. 1047, is reported in 6 Am. Neg. Cas. 134.

2. *Cawfield v. Asheville Street R'y Co.*, 111 N. C. 597, is reported in 6 Am. Neg. Cas. 116.

3. For actions arising out of injuries sustained while ALIGHTING FROM OR BOARDING TRAINS, STREET CARS, ETC., from the earliest period to 1896, decided in the several State and Federal courts,

see vols. 2-7, Am. Neg. Cas., where the same are arranged in alphabetical order of States. The *Pennsylvania cases* are reported in 6 Am. Neg. Cas. A number of cases on passengers jumping to avoid danger will be found in the aforementioned volumes of Am. Neg. Cas. For subsequent actions, see vols. 1-4, Am. Neg. Rep., and the current numbers of that series.

DAMAGES — EXCESSIVE VERDICT. — A verdict for \$3,500 was not excessive where it was shown that the plaintiff was a music teacher, earning \$50 a month, and on account of the injury was unable to work for four months, and after that had to employ a servant to do her household work, her leg being slightly lengthened and sore, and her nervous system permanently injured.

DAMAGES. — One who is compelled, because of an injury, to employ a servant to do household work, is entitled to damages for the expense.

APPEAL from a judgment, Court of Common Pleas, Allegheny County, in favor of plaintiff.

Upon the morning of April 8, 1897, the plaintiff, Mrs. Aurelia E. Willis, boarded a car of the defendant company running upon this line at or near North avenue, in the city of Allegheny, and there were also a number of other passengers upon the same car. On the way down Sandusky street the car was stopped, and a report was made to the inspector or dispatcher, whose office is at that point, that the controller was not working properly. The inspector then boarded the car, and rode from that point down to the crossing of the West Penn tracks, examining the controller; and, according to the evidence, he made the statement that the controller was apparently all right, and that he could find nothing wrong with it. In the meantime the car had been stopped in front of the safety gates at the railroad crossing, the safety gates having been lowered and being properly in place, and a train upon the railroad was passing at the time. Suddenly, and without any apparent reason, and without any cause which the defendant company seemed to be able to explain, the power or the electrical current suddenly came on, and there was a flash of light, and the car gave a plunge or bound forward, breaking off the end of the safety gate, and coming in contact with the rear car upon the railroad train. The plaintiff, in her fright when the car went forward, leaped from her seat, and ran out upon the rear platform, and from there she states that she was thrown to the ground. Whatever injuries she may have received at this time were the result of the fall from the platform to the ground. So far as the testimony shows, no one upon the street car received any injury except the plaintiff, as the other passengers apparently remained upon the car. Plaintiff was a music teacher, earning from \$50 to \$60 per month. As a result of the injury, she was unable to work for four and one-half months, and after that she was obliged to hire a servant to do her household work. Her injuries, which several physicians testified were permanent, consisted in a lengthening and soreness of the leg, and injury to the nervous system. As a result of the trial the jury brought in

a verdict for plaintiff for \$3,500, and from a judgment entered thereon this appeal is taken.

STONE & POTTER, for appellant.

YOUNG & TRENT, for appellee.

The points decided are stated in the syllabus.

Judgment affirmed.

Opinion PER CURIAM.

KING v. GRANGER, CITY TREASURER.

Supreme Court, Rhode Island, December, 1898.

MUNICIPAL CORPORATIONS — SEWERS — WATER BACKING UP. —

Where a city, after constructing a sewer — ample for its purpose — changes the established grades of adjoining streets so as to turn additional water into the sewer, which was not constructed for such purpose, and its capacity is overtaxed and the water backs up on land of adjoining property owners, it is liable for the injuries.

RELEASE OF CITY FROM LIABILITY — CONDITIONS NOT CONTEM-

PLATED. — Where a property owner, in consideration of being allowed to make connection with a sewer, delivered a certain instrument in writing agreeing "that no claim for damages which may be occasioned to such estate or any property thereon in any manner by the construction, use, or existence of such drain or connection, shall be made against the city," such agreement was equivalent to the release required by Laws of R. I., ch. 313, sec 5, but did not relieve the city from liability for injuries from an overflow occasioned by conditions not existing at the time the agreement was entered into.

DEMURRER to complaint.

IRVING CHAMPLIN, for plaintiff.

FRANCIS COLWELL and ALBERT A. BAKER, for defendant.

TILLINGHAST, J. — The case which the declaration states is briefly this: The city of Providence constructed a sewer in Manton avenue, a public highway, for the purpose of carrying off the surface water, sewage, and drainage from said avenue and the land adjacent thereto. The plaintiff, who was and is a landowner on said highway, was assessed his proportional part of the expense of constructing said sewer, which assessment was paid by him. Thereafterwards, on the 9th day of October, 1891, he made application to the commissioner of public works of the city for leave to connect his estate with said sewer, for the purpose of taking the drainage and sewage from his estate, which application was duly granted. At the time the sewer was constructed, it had sufficient capacity to receive and carry away, and did receive and carry away, without injury to

plaintiff, all the sewage and drainage from said Manton avenue and the land adjacent thereto, including the drainage from plaintiff's estate. Subsequent to the time when plaintiff connected his premises with said sewer, to wit, in 1895, the city changed the grade of said Manton avenue, and of several other streets connected therewith, whereby the surface water which had formerly flowed in another direction in said streets was turned into said avenue, and into the said sewer, which, not having been designed nor constructed by said city to receive and discharge the surface water of said additional streets and the territory adjacent thereto, and being of insufficient capacity for this purpose, became congested, and overflowed upon the plaintiff's premises, causing him to be damaged. The plaintiff alleges that the conduct of the defendant in thus turning said additional surface water into the sewer was wrongful and negligent, and that he is entitled to recover the damages which he has sustained by reason thereof. The defendant demurs to the declaration, setting up that said sewer is a part of the sewer system of the city; that it is not required to construct said sewer of such size and dimensions as would carry off all the surface water, sewage, and drainage which from time to time after such construction was or might be turned therein as a part of said system; that it had the right to turn the surface water from said streets into said sewer; that the defendant is not liable for any defect or want of efficiency in the plan of drainage and sewerage adopted by it, and also that the defendant is not liable, because the plaintiff had no right to connect his premises with said sewer, under the statute, except upon executing to said city a release of all damages which might at any time happen to such estate in any way resulting from said connection.

In support of the demurrer, the defendant's counsel argue (1), that the only substantive fact upon which the alleged negligence is based is that said sewer was not of sufficient capacity to carry off the surface water turned into it by a change of the grade of certain streets, in addition to the amount of water which had theretofore been turned into it; and, (2), that there is no substantive difference between the statements of fact in said declaration and those in *Baxter v. Tripp*, 12 R. I. 310.

We think the last-named contention is untenable. The facts in *Baxter v. Tripp* were materially different from those in the case before us. In that case the declaration alleged that the city wrongfully and negligently constructed a sewer in Lippitt street, and wrongfully and negligently used and maintained the same, whereby the plaintiff's estate was flooded and damaged. It was neither

alleged nor claimed in that case that, after the sewer was built, a large amount, or any amount, of surface water, in addition to that originally intended to be taken care of by the sewer, was turned into it by changing the grade of the streets in the vicinity, or otherwise. And the court held that, under the agreement signed by the plaintiff at the time he applied for permission to connect his premises with the sewer, said agreement being similar to the one here set up by the defendant in its plea in bar, which we will consider later, the action could not be maintained. So that the question now presented, namely, whether, in case a much larger amount of surface water is turned into a sewer than was contemplated at the time of its construction, and an abutter is injured thereby, he can recover, was not raised or considered in that case. There the incapacity of the sewer, when constructed, to serve the purpose then contemplated by the city, was the thing complained of; while here it is the overtaxing of the sewer in the manner aforesaid, after its construction. We think that in such circumstances the city may properly be held liable for the damages sustained thereby, and hence that the demurrer to the declaration must be overruled.

We now come to the defendant's special plea in bar, which sets up, in substance, that, prior to and at the time when the plaintiff connected his premises with said sewer, he executed and delivered to the city a certain instrument in writing, agreeing "that no claim for damages which may be occasioned to such estate, or any property thereon, in any manner, by the construction, use, or existence of such drain or connection, shall be made against the city." To this plea the plaintiff demurs, and we are therefore called upon to determine as to its sufficiency. The particular grounds of demurrer are, 1, that the said agreement was not under seal, and that it contains no release to said city; and 2, that the bringing of the plaintiff's action does not constitute a breach of his said agreement, inasmuch as the damages complained of were not occasioned "in any manner by the construction, use, or existence of such drain or connection." Plaintiff also demurs generally to said plea, alleging that he is not barred by said agreement from bringing his action.

We think the first ground of demurrer is untenable; for, while it is true that said agreement is not technically a release, yet, as said by Durfee, Ch. J., in *Baxter v. Tripp*, *supra*, where a similar agreement was considered, "it must be held to be, at least, equivalent to the release required by statute." See Pub. Laws R. I., c. 313, sec. 5, passed March 28, 1873.

We think the second ground of demurrer is well taken. The agreement in question was evidently entered into in view of the

facts and conditions existing at the time, together with such other facts and conditions as might and ought reasonably to have been anticipated from the ordinary growth and development of the contiguous territory; that is to say, the plaintiff knew, or was bound to presume, when he signed said release, that, by reason of the construction of other streets in the immediate neighborhood, some additional surface water might naturally be turned into said sewer. But he did not know, and had no reason to anticipate, that the city would subsequently so change the grade of said Manton avenue, and of several other streets connected therewith, as to turn a large amount of surface water and sewage, which had formerly flowed in another direction, into said sewer, and thereby cause the same to overflow upon his premises. On the contrary, he had the right to presume that the city would not unreasonably tax the capacity of said sewer, so as to cause him damage. If this were not so, it would be competent for the city, after laying a sewer and obtaining releases from those who should connect their premises therewith, so to overtax the capacity of the sewer as not only to render it useless to the abutters, but also to cause it to become a source of constant annoyance and damage to them. We do not think that the statute under which the release in this case was given should be so construed as to permit of such a wrong. It is true, the language thereof is quite comprehensive, but it does not necessarily include such a claim as that here counted upon by the plaintiff. And, as an abutter is compelled to sign a release in order to enjoy the principal benefit to be derived from the construction of the sewer, we think it should be construed as favorably to him as its terms will reasonably allow. And it is unreasonable to suppose that the general assembly intended that the release required of an abutter, as a condition of his connecting his premises with the sewer, should absolutely and forever bar him from all claims whatsoever which might subsequently arise by reason of such connection. Suppose, for instance, that the city should neglect the duty of keeping the sewer in proper repair, and the plaintiff should be damaged thereby; could it be reasonably claimed that said release would bar him from recovery? We think not. The city is not absolved from the discharge of its duty in the premises in this regard by reason of the release; nor can it so change the plan which it adopted when the sewer was built as to render the sewer a nuisance to him. Moreover, it would clearly be against public policy to allow the city to shield itself behind an agreement of this sort from the consequences of its own negligence. See the suggestion of Durfee, Ch. J., in *Baxter v. Tripp*, 12 R. I., on page 318.

If the city desires to drain a much larger territory by the use of said sewer than was originally contemplated, and than said sewer is capable of draining, it must increase its capacity. It cannot materially change its plan as to the territory to be drained without also changing its plan as to the size of the sewer. For any error in judgment on the part of the city authorities in devising and adopting a plan for taking care of the surface water and sewage of a given district, or of the city as a whole, many, and perhaps a majority, of the courts, hold that no responsibility exists, as, in so doing, the city is exercising a legislative or quasi-judicial power, and not discharging a merely ministerial duty. But having once adopted a given plan, and constructed the sewers in accordance therewith, the judicial discretion ends, and the ministerial duty begins; and, like an individual, it then ordinarily becomes liable for damages to others resulting from the negligent discharge of, or the negligent omission to discharge, such duty. *Child v. City of Boston*, 4 Allen, 41.

Finally, we fail to see how the case at bar can be distinguished, on principle, from that of *Inman v. Tripp*, 11 R. I. 520. In that case this court held that it was an invasion of private property for the city so to grade its streets as to collect the water from a wide area, and then empty it, charged with all its miscellaneous filth, upon the plaintiff's land. In the case at bar the declaration shows that the city, by changing the grade of several streets, has unreasonably overtaxed the sewer with which the plaintiff's premises are rightfully connected, and has thereby caused a retroflux of sewage through said connection, and upon his premises, to his damage; and we fail to see how this act of the city is any less an invasion of private property than was the act of the city in the case just mentioned.

The defendant's demurrer to the declaration is overruled, and the plaintiff's demurrer to the defendant's plea in bar is sustained. Case remitted to the Common Pleas Division for further proceedings.

ROGERS V. GRANGER, CITY TREASURER.

Supreme Court, Rhode Island, November, 1898.

MASTER AND SERVANT — TRENCH CAVING IN — EVIDENCE. — In an action for injuries sustained by the caving in of a trench in which plaintiff was digging, evidence of plaintiff that just before the cave-in his shovel

struck a water main does not support allegations that the land had been dug up for a water main and lately filled in with dirt, so that it was liable to cave.

SAME. — In order to recover plaintiff must also prove that the defendant failed to provide the necessary sheathing for the sides of the trench.

PLAINTIFF was nonsuited and petitions for a new trial.

BRENNAN & HOLLAND, for plaintiff.

FRANCIS COLWELL, for defendant.

TILLINGHAST, J. — The evidence in this case falls short of supporting some of the material allegations in the plaintiff's declaration. It is alleged, *inter alia*, that at the place where the trench for the sewer was being dug the land had been lately filled in with dirt, and that at the place where the plaintiff was injured a ditch in which a water main was laid had been dug, so that the earth around said water main, having been once thrown out and afterwards replaced, was liable and likely to cave and fall into said trench, thereby rendering it unsafe to dig near to and below said water main. At the trial of the case, however, no proof was offered in support of these allegations, except that of the plaintiff, who simply testified that immediately before the bank caved in upon him he struck a water main, and took a shovel full of dirt from it, and that was the last he knew. He also testified that no one had told him that the water main was there, or that the ground had been dug up before. This is not enough. He must prove, as alleged, that the place where he was at work was on land which had been lately filled, and also that by reason thereof the city was called upon to exercise a greater degree of care in protecting its employees than it otherwise would have been; that is, he must show that, either by reason of improper filling or otherwise, the earth in question was not as firm as "virgin soil." For aught that appears in the proof, the said water main may have been laid many years since, and the earth around it may have become as firm and compact as if it had never been removed. And, further, the earth may have been so skilfully and carefully replaced, by puddling or otherwise, as to render it as compact as ever, even if, as alleged, it was "lately filled in." He must also prove the failure of the city to provide and furnish the necessary plank or timber for bracing or sheathing the sides of the trench. *Dube v. City of Lewiston*, 83 Me. 211, 22 Atl. Rep. 112, and cases cited; 2 Bailey, Pers. Inj., sec. 2932. See also, *Regan v. Palo* (N. J. Sup.), 41 Atl. Rep. 364, 5 Am. Neg. Rep. 63. It is true, the failure to make out the plaintiff's case in the particulars suggested was not the ground upon which the motion for nonsuit was made and granted, although counsel for defendant now makes.

the point in his brief that no proof was offered in support of the allegations referred to. But, as it is clear that the nonsuit was rightly granted, it is immaterial as to the ground upon which it was based. Whether the ground upon which the nonsuit was granted, therefore, viz., that the negligence which caused the accident, if there was any negligence, was that of a fellow-servant, is tenable, it is not necessary for us now to decide. As the plaintiff failed to make out his case in the particulars above referred to, the nonsuit was rightly granted, and the petition for new trial must therefore be denied.

Petition denied and dismissed.

DRYBURG v. MERCUR GOLD MINING AND MILLING COMPANY.

Supreme Court, Utah, December, 1898.

MASTER AND SERVANT — SUPPORT OF LADDER REMOVED BY FELLOW-EMPLOYEE — FELLOW-SERVANTS. — 1. Plaintiff, while in defendant's employ, fell from a ladder connecting an upper tunnel with a lower one, in consequence of the removal the same morning, without his knowledge, of waste supporting one of the uprights. The plaintiff had been at work in the upper tunnel four days, and the waste had been removed by Saunders, another miner, working in the tunnel twelve feet below, under instructions of the superintendent to remove waste therefrom. Plaintiff was at work forty feet from the ladder, and, when he fell, was going for a sledge hammer which he needed, and the only light at the ladder was his candle. *Held*, the court should have submitted the issue as to contributory negligence to the jury, under instructions defining the phrase, in view of the circumstances in evidence.

2. Section 1343, Rev. St. Utah, declaring: "All persons who are engaged in the service of such employer, and who while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow-employees, are fellow-servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow-servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow-servants," — is a definition of the phrase "fellow-servants" which the legislature had the power to make. The court may explain its provisions to the jury in view of the evidence; but whether the plaintiff in this case and Saunders were working together at the time and the place of the negligence was an essential fact the jury should have been permitted to determine from the evidence before them.

MINER and BARTCH, JJ., dissenting.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Salt Lake County, in favor of defendant.

M. L. RITCHIE and BOOTH, LEE & GRAY, for appellant.

J. E. FRICK and WILLIAMS, VAN COTT & SUTHERLAND, for respondent.

The facts and points decided are stated in the syllabus by the court.

Judgment reversed.

Opinion by ZANE, Ch. J.

NELSON V. SOUTHERN PACIFIC CO.

Supreme Court, Utah, December, 1898.

JURY COMMISSIONERS. — 1. The law fixing the time for the appointment of jury commissioners, as well as section 1306, Rev. St., providing for the selection of jurors by them, is directory as to time.

APPEAL.— 2. Under section 9, art. 8, Const., an appellate court cannot review findings of fact further than is necessary to determine questions of law.

STOCKMAN KILLED WHILE ON TOP OF CAR PASSING UNDER BRIDGE. — 3. The question of negligence on the part of the appellant and contributory negligence on the part of deceased was properly submitted to the jury.

4. It was negligence on the part of the appellant not to maintain its snowsheds high enough for a person to pass beneath them safely while walking on top of the refrigerator cars; but if, for any reason, a shed of insufficient height was maintained, then the exercise of ordinary care requires the railroad company to give warning in some way, either by word or other proper method, of the train's approaching the same, to all persons whose duties expose them to danger because of the structure.

5. Evidence of what was usual and customary among stockmen as to going upon the tops of cars under the circumstances and conditions surrounding deceased when he was killed was properly admitted as tending to prove deceased simply in discharge of his duty, as indicated by a usage among stockmen known by railroad men, and not guilty of contributory negligence.

6. The written contract delivered to deceased by appellant, showing his right to be on the train as an attendant on sheep in transit, having been lost, it was competent to prove its contents by parol.

BARTCH, J., dissenting.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Weber County, in favor of plaintiff.

MARSHALL, ROYLE & HEMPSTEAD, for appellant.

DAVID EVANS, L. R. ROGERS, and A. G. HORN, for respondent.

This was an action to recover damages in consequence of the death of Charles A. Nelson, caused, as alleged, by the negligence of the defendant in placing three refrigerator cars between the caboose and eleven cars loaded with sheep in charge of deceased and two other men, and in constructing and maintaining a snowshed so low that deceased was killed by it while passing over a refrigerator car from the sheep cars to the caboose, the refrigerator car being about eighteen inches higher than other freight cars.

The points decided are stated in the syllabus by the court.

Judgment affirmed.

Opinion by ZANE, CH. J.

BROWN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court, Wisconsin, December, 1898.

ACTIONS FOR DEATH — STATUTE. — Actions for death losses are wholly statutory, and unless the right to surviving relatives is thus given does not exist.

RIGHT OF ACTION FOR BENEFIT OF DECEDENTS' BROTHERS AND SISTERS. — A right of action for the benefit of a decedent's brothers and sisters is not authorized by Rev. St. 1898, sections 4255 4256, which provide that if the death of a person be caused by the wrongful act of another, under such circumstances that if death had not ensued such person could have recovered damages, such other shall be liable to an action for damages notwithstanding the death, prosecuted in the name of the personal representatives of the deceased person, for the benefit of the husband or widow of such person, if there be such surviving, otherwise for the benefit of such person's lineal descendants, or, in default of such descendants, such person's lineal ancestors.

RIGHT OF ACTION FOR DEATH SURVIVES. — Though the right of action conferred by the statute above noted is exclusive and limits the right to those for whose benefit it may be enforced, the cause of action survives to the personal representative in case of death under section 4253, which provides generally that actions for the recovery of damages to the person shall survive.

FROM an order of Circuit Court, Dane County, sustaining a demurrer to the complaint, plaintiff appeals.

Action to recover damages for a personal injury to August Zilmer, deceased, and also damages for his death. The complaint states all formal matters, and, in substance, that on the 29th day of August, 1895, at the incorporated village of Deerfield, in this State, at a crossing of defendant's railroad with a public street in such village,

August Zilmer was traveling on the street with due care, riding in a wagon drawn by a horse, and while so circumstanced defendant's servants caused one of its locomotives to approach and go onto and over the crossing at an unlawful rate of speed, to wit, forty miles an hour, without in any manner signaling such approach, whereby, without contributory fault of Zilmer, the locomotive struck his horse and wagon, and threw him with great force and violence on the ground, bruising and wounding him upon his head, body and limbs, thereby causing him to suffer great mental and physical pain, from the effects of which he on the same day died, to the plaintiff's damages in the sum of \$5,000. The complaint further stated that the deceased left no wife, or father or mother or children, but left some brothers and sisters, and stated facts showing that a pecuniary loss was sustained by them by reason of his wrongful death, to the extent of \$5,000. The defendant demurred generally to the complaint, which demurrer was sustained, and from the order accordingly entered this appeal was taken.

BUSHNELL, ROGERS & HALL, for appellant.

FISH, CARY, UPHAM & BLACK, for respondent.

MARSHALL, J. (after stating the facts). — Two questions are presented on this appeal: 1. Can brothers and sisters of one wrongfully killed recover damages from the wrongdoer to compensate them for the pecuniary loss thereby sustained? 2. Does a cause of action for damages to a person, because of an injury from the effects of which death ensues, survive to his administrator for the benefit of his estate? The decision of either of these questions in favor of the appellant must result in a reversal of the order appealed from.

Actions for death losses sustained by surviving relatives are wholly statutory, and therefore, unless clearly thus given, do not exist at all. The subject in this State is covered by sections 4255, 4256, Rev. St. 1898, which provide that if the death of a person be caused by the wrongful act of another under such circumstances that if death had not ensued such person could have recovered of such other damages for his injury, such other shall be liable to an action for damages notwithstanding the death, such action to be brought and prosecuted in the name of the personal representative of the deceased person for the benefit of the husband or widow of such person if there be such surviving, otherwise for the benefit of such person's lineal descendants, or, in default of such descendants, such person's lineal ancestors. We are asked to hold that by such statutes the right of action for the wrongful death of a person is conditional only upon the circumstances being such that if death had not ensued the decedent could have proceeded against the wrongdoer for damages.

If the statute were susceptible of that construction, in any reasonable view of the language used, and we think it is not, the contrary view has been too long established as its true meaning to leave the matter open to question at this time. In *Woodward v. Railway Co.*, 23 Wis. 400, decided thirty years ago, it was held that unless a person named in the statute as entitled to the benefit of a recovery when obtained, be shown to be in being by the allegations of the complaint, the calls of the statute are not satisfied and the action for damages for the death cannot be sustained. That is in line with the numerous decisions in this country and England where similar statutes exist, as abundantly appears in the opinion of the learned chief justice in the case cited, and the numerous authorities cited there by counsel. It has never been since questioned successfully in this court, but on the contrary has been repeatedly affirmed. *Topping v. Town of St. Lawrence*, 86 Wis. 526, 57 N. W. Rep. 365; *Regan v. Railway Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Gores v. Graff*, 77 Wis. 174, 46 N. W. Rep. 48; *Schmidt v. Wooden-Ware Co. (Wis.)*, 74 N. W. Rep. 797. The reasonableness of that construction is fully realized when one considers, as the fact is, that the action for a death loss to a surviving relative is not a right by survivorship to the claim which existed in favor of the injured person in his lifetime. If that right of action exist at all, it is for the benefit of the estate under the statute, to be hereafter considered under the second point made by appellant. The death loss act of the English statute (9 and 10 Vict. c. 93), commonly called "Lord Campbell's Act," and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. As was said by Mr. Justice Orton, in *Topping v. Town of St. Lawrence*, *supra*, the action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives; it is rather a new action by sections 4255 and 4256, which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute. Counsel's contention is that the liability is made absolute by section 4255, and therefore is not limited by the following section which designates who shall be the beneficiaries. As before indicated, that question

has long been foreclosed in this court, contrary to counsel's contention; nevertheless, if the question were now presented for the first time, in view of the fact that the section giving the right is coupled with the section for its enforcement, it would appear to be a very plain proposition that such remedy is exclusive, and necessarily limits the right to those for whose benefit it may be enforced, *i. e.*, to the particular beneficiaries named and in their order, that is, husband or widow, if there be such, otherwise lineal descendants, and, in default of such, lineal ancestors.

On the question of whether a cause of action for injury to the person survive to his personal representative in case death ensue therefrom, this court held in the affirmative in *Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. Rep. 170, construing what is now section 4253, Rev. St. 1898, which provides generally that actions for the recovery of damages to the person shall survive. The subject there received most careful consideration, and no reason is perceived now for changing the ruling there made.

The learned counsel for respondent contend, with much learning, that the section last referred to, and sections 4255 and 4256 of the statutes, giving a right of action to relatives in certain circumstances specified, should be construed together, so as to limit actions that survive under section 4253 to cases where death does not ensue from the injury. That claim has the merit of being supported by decisions elsewhere under similar laws, but looking only to the language of the statutes, no good reason is perceived for resorting to construction at all to determine their meaning. The language seems too plain to allow that. We have not even good reason for saying, as some courts have, that the statutes were enacted at the same time, or went into effect at the same time, and it is therefore unreasonable to hold that the legislature intended to give two rights of action at the same time for one injury. The law of this State conferring upon surviving relatives the right to recover their pecuniary loss caused by the wrongful taking off by death of a husband, wife, child, father or mother, has existed for over forty years, while the law reviving the right, in favor of the personal representatives of a deceased person, to his claims for damages to his person, was not enacted till 1887. But independent of that circumstance, as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights; the one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute. The

language of one provision is that "actions for personal injuries shall survive," and of the other, "in case of the death of a person by the wrongful act of another," under certain circumstances named, the wrongdoer "shall be liable to an action for damages notwithstanding the death of the person injured, if the death be caused in this State." The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the wrongdoer, while dependent on the condition named, is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute; the right of the surviving relatives to compensation for the loss which falls upon them. The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify courts in interpolating into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy. The judicial function, we need not say here, does not extend so far. It calls for a firm adherence to the law as written, if valid, without regard to individual opinions as to its being good or bad. In this we do not intend to suggest that the law in question, as construed here, is a bad law. On the contrary, there appears to be much wisdom in providing that a person who wrongfully causes a personal injury to another, shall not profit by that other's death, so far as actual damages go, either to the deceased person or to the wife, husband, or lineal descendants or ancestors of such person.

True, as claimed by the learned counsel for respondent, and before indicated, several courts, for whose judgment we entertain high regard, in construing similar statutes have decided that the right of action to surviving relatives is exclusive, and that the personal injury action that survives under section 4253 does not include those where death ensues from the injury. A good example, among others cited in counsel's brief, is *Holton v. Daly*, 106 Ill. 131. That learned court reasons that there is but one ground of liability, the wrongful act; and as all claims for damages grow out of the one wrong it is unreasonable to say the legislature intended there shall be two causes of action based upon it; that the more reasonable view is that the act making causes of action for personal injuries survive should be considered as referring to a special class of actions,

not included in those named in the general provision giving a right of action to surviving relatives; that without that construction there would be a repugnance between the two provisions. The fallacy of that reasoning is easily apparent. True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct. It does not require, apparently, much clearness of mental perception to discover that if several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him, and that, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist.

The views of the Illinois court accord with the judgment of the Supreme Court of Kansas. *McCarthy v. Railroad Co.*, 18 Kan. 46; *City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. Rep. 113; *Martin v. Railway Co.*, 49 Pac. Rep. 605. It is significant that the former treats the act for the survivorship of the right to recover damages to the deceased for the benefit of his estate as a special provision, and that for the benefit of surviving relatives as a general act, and that, giving them a literal interpretation, they are repugnant to each other in part; while the latter reverses the situation, treating the act of the claim for damages to the deceased as general, and that for the benefit of surviving relatives as special, the latter being intended to take away the right of survivorship for the benefit of the estate, which would otherwise be given by a literal reading of the former provision. The fallacy of both processes of reasoning grows out of a failure to observe the distinction between the wrong and the resulting loss; that though there be but one wrongful act and one physical injury, there may be several persons that suffer distinct losses, some of which are actionable at common law and some actionable dependent on the statute. Justice Brewer, who was a member of the Kansas court at the time the first decision there was rendered, and concurred in it, referred to the subject when he was later called upon to consider the matter as a member of the federal bench, in the case of *Hulbert v. City of Topeka*, reported in 34 Fed. Rep. 510, said, substantially, that he doubted the correctness of his former opinion, and followed it only in deference to the settled judicial policy of Kansas, the cause being one that arose there; that the

basis of recovery under the two provisions of law under consideration, the one for the benefit of the estate of the decedent and the other for the benefit of his surviving relatives, are entirely distinct, the former being based on survivorship of the claim of the deceased, taking no note of the pecuniary loss to relatives, and the other on survivorship of relatives mentioned in the statute, taking no note of damages to the decedent; that the latter proceed regardless of whether the death was instantaneous or followed after months of pain and suffering, being damages to relatives by death to be measured by their pecuniary loss caused thereby; while the former is for loss that would otherwise be a permanent injury to the estate itself. For further illustrations of the distinction, the following in Mr. Justice Wilson's opinion in *Needham v. Railway Co.*, 38 Vt. 294, is quoted by Justice Brewer: "The principles on which the intestate's cause of action rested at common law are the same, irrespective of the cause of his death." It "died with his person but is revived by the statute in favor of his administrator." It includes "nothing more than his intestate's cause of action. The statute simply revives but does not enlarge the common-law right of the intestate." The provision for surviving relatives "introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate." "Such damages to the widow and next of kin begin where the damages of the intestate ended, viz., with his death."

The weakness of the theory that the action for injuries to the person, which survive, includes only those not covered by the statute for the benefit of surviving relatives, is further illustrated by the fact that courts adhering to that view uniformly refer to *Read v. Railway Co.*, L. R. 3 Q. B. 555 (1). The decision there is only to the effect that if an injured person have satisfaction of his claim before

1. In *Read v. Great Eastern R'y Co.*, L. R. 13 Q. B. 555, it was held that the 9 & 10 Vict., c. 93, gives to the personal representative of the person killed by the wrongful act, neglect, or default of another, not an independent cause of action, but a right of action, when there was a subsisting cause of action at the time of the death. To a declaration on that statute, accord and satisfaction with the deceased in his lifetime is a good plea.

In such action the declaration was by a widow against a railway company

for negligence, whereby her husband, a passenger, was injured, and in consequence died. Plea, that in his lifetime the company paid him and he accepted a sum of money in satisfaction and discharge of all claims and causes of action which he had against them. *Held*, that the plea was good, as the cause of action was the negligence of the company, which had been satisfied in the deceased's lifetime, and his death did not create or give a fresh cause of action to his widow.

death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person and there is an existing claim for damages therefor at the time of his death. Justice Blackburn, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. Railway Co.* in conflict with *Blake v. Railway Co.*, 10 Eng. Law & Eq. 443 (2), where, in a very instructive opinion by Coleridge, J., it is said that Lord Campbell's act does not transfer to the surviving relatives mentioned the claim for damages previously possessed by the deceased, but gives to them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statutes is separate and distinct from that possessed by the deceased; the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages.

With proper regard for the argument of the learned counsel for respondent, we cannot well close this discussion without some review of the decision of the Supreme Court of Rhode Island in *Lubrano v. Atlantic Mills*, reported in 32 Atl. Rep. 205, which is cited to our attention with great confidence. The case expressly holds with the Illinois court and the Kansas court that the statute giving the right of action to personal representatives of a person wrongfully killed, for the benefit of certain relatives named, is exclusive. The case does not throw any new light on the subject under consideration, except as to the inherent weakness of the reasoning indulged in to support the theory which the distinguished court adopts. *Read v.*

2. In *Blake v. Midland R'y Co.*, 10 Eng. L. & Eq. 437, 443, it was held that in an action founded on the 9 & 10 Vict., c. 93, by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating the damages, cannot take into consideration mental sufferings or loss of society, but must give compensation for pecuniary loss only.

Railway Co., *supra*, is cited without perceiving, apparently, that, as before indicated, it only holds that where the claim of the deceased person is extinguished, one of the conditions requisite to the cause of action for damages under Lord Campbell's act is impossible, therefore statutes on that subject have no office to perform; that it has no bearing on the question of whether, in the absence of such extinguishment, there are two rights or causes of action for distinct and separate losses. Again, the learned court falls into an error heretofore mentioned, in referring to the two statutes as one being general and the other special, and that the two in part refer to the same subject, viewing the liability of the wrongdoer as entire merely because based on a single wrong. As we have seen, each treats of a distinct species of loss, and for that is general. There is no question of repugnancy or implied repeal of one provision by another on the same subject, or the substitution of one right for another, to be considered, if we give effect to the plain reading of the law and not attempt to vary it because of consequences which to some minds may appear to throw unreasonable burdens upon the wrongdoer. It must be presumed that the legislature had all these matters in mind, and from its judgment there is no appeal.

The Rhode Island court, further discussing the subject, speaks of the right of survivorship as a mere remedy given as a substitute for that which existed in the right of the decedent. Here again, there is a confusion between rights and remedies. To say that section 4255 of our statutes gives a remedy for the one that at common law lapsed with the death of the decedent is to say that it gives a new remedy for a pre-existing right. But there was no such pre-existing right of the surviving relatives to recover their loss caused by the wrongful death. The right or cause of action itself is new, and the remedy to enforce it as well, as observed, in effect, in *Topping v. Town of St. Lawrence*, 86 Wis. 526, 57 N. W. Rep. 365. The court further, in support of its decision, refers to *Needham v. Railroad Co.*, 38 Vt. 300, stating that the Vermont court later, in *Leg v. Britton*, 64 Vt. 652, 24 Atl. Rep. 1016, overruled its former judgment on the subject of whether there were two causes of action in the circumstances under discussion. A careful reading of the opinion in the later Vermont case discloses the fact that it is there held, in perfect harmony with the early case, that two causes of action exist; one in the right of the estate; and the other in the right of the surviving relatives where the cause of action of the deceased is not extinguished before his death. The court said that the extinguishment of the cause of action in the right of the deceased was a bar to that in favor of the surviving relatives. There, the action for

damages to the injured person was brought in his lifetime and prosecuted to judgment and satisfaction after his death, and the court said that under such circumstances the right of the deceased was extinguished with the same effect as if satisfaction had occurred before death, therefore that the circumstances requisite to the application of the statute, giving the right of action to the widow and next of kin, did not exist. Using substantially the language of the court, there was left no proper office for the act for the benefit of the widow and next of kin to perform.

There are many other cases bearing on the subject before us, but they do not add anything to what has been said, or call for further discussion, so we shall not further extend this opinion by referring to them. We are well satisfied that section 4253 preserves for the benefit of the estate of a deceased person the cause of action possessed by him in his lifetime for an injury, resulting in his death, and that it is not affected in any way by the other right or cause of action given by sections 4255 and 4256 to his surviving relatives to recover for the loss sustained by them; that such is the plain meaning of the statutes, and that if the language used were open to construction at all, the view we have adopted is supported by far the better reasoning and the greater weight of authority. The Supreme Court of Michigan, in *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. Rep. 44, quite recently had the same subject under consideration, with the same result at which we have arrived. That court said, in effect, that a pecuniary loss sustained by a surviving relative resulting from a wrongful death, recoverable under the statute, is one thing; and that damages for the injury to the deceased is another; and that a recovery for the former is no bar to an action for the latter.

Of course, there is no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question. We have referred to cases holding that a satisfaction of a claim in the right of the estate leaves the statute giving the other right of action no office to perform, merely in support of the position that the two statutes deal with separate and distinct rights.

The complaint demurred to, by sufficient allegations, shows that plaintiff's intestate was injured by actionable negligence of the defendant, and that he lived thereafter some period of time. The length of time he survived the injury is not stated and is not material except as to the damages recoverable, and that does not go to the cause of action. *Bancroft v. Railway Corp.*, 11 Allen, 34; *Hollenbeck v. Railway Co.*, 9 Cush. 478; *Tully v. Railroad Co.*, 134 Mass. 499;

Chandler *v.* Railroad Co., 159 Mass. 589, 35 N. E. Rep. 89; Corcoran *v.* Railroad Co., 133 Mass. 507; Kellow *v.* Railway Co., 68 Iowa, 470, 23 N. W. Rep. 740, and 27 N. W. Rep. 466. Within the principles stated the complaint states one cause of action, and that for the recovery of damages which the deceased sustained and which he might have recovered for had he lived. Therefore the decision of the trial court sustaining the demurrer to the complaint must be reversed.

The order appealed from is reversed and the cause remanded for further proceedings according to law

GREEN *v.* ASHLAND WATER COMPANY.

Supreme Court, Wisconsin, November, 1898.

WATERWORKS COMPANY SUPPLYING WATER NOT GUARANTOR OF PURITY. — A waterworks company, operating under a franchise from, and contract with, a municipal corporation, in distributing water for public and domestic use, is not responsible as an implied warrantor of the purity of the water distributed by it.

WATERWORKS COMPANY KNOWINGLY SUPPLYING IMPURE WATER TO CUSTOMERS LIABLE FOR INJURIES. — If a waterworks corporation knowingly supply to its customers water contaminated with impurities so as to render it dangerous for domestic use, under such circumstances that its customers are liable to use the water in ignorance of the danger, it owes to such customers the duty of disclosing such danger, and a failure in that regard renders the corporation liable in damages to a customer injured by the use of such water without contributory fault on his part amounting to a want of ordinary care, and the liability may be placed on the ground of either actionable negligence or fraud.

KNOWLEDGE OF IMPURITY BY CUSTOMER PRECLUDES RECOVERY. — In the circumstances stated in the foregoing, whether the liability be placed on the ground of negligence or fraud, knowledge or reasonable means of knowledge, of the condition of the water, on the part of the injured person, will preclude a recovery.

EVIDENCE. — In an action for damages, attributed to the negligence of another, evidence of precautions taken to prevent injuries of like character after the happening of the one complained of, is inadmissible, and likewise is evidence as to the situation after the injury, unless preceded by *prima facie* proof that no change has taken place in the meantime.

SAME. — The admission in evidence of newspaper publications, and proceedings of public bodies, consisting in the main of declarations and statements irrelevant to the issue, and manifestly tending to inflame and prejudice the minds of the jury, though containing some evidence which, standing alone, may be properly received, is prejudicial error.

OPINION EVIDENCE. — Opinion evidence based on disputed evidentiary facts, not the subject of scientific investigation, is not admissible except in response to properly framed hypothetical questions.

SAME. — Where the only point as to which opinion evidence is directed is properly a matter of scientific investigation, an expert in that line may testify directly thereto from personal investigation.

SEWAGE IN WATER SUPPLIED BY WATERWORKS COMPANY — CONTRIBUTORY NEGLIGENCE OF CONSUMER. — If a water company's source of supply be contaminated with sewage for a long period of time, causing epidemics of typhoid fever annually in a community for several years, and the facts in that regard be there notorious and a matter of common knowledge, the presumption is that members of such community of ordinary intelligence have notice of that situation, and, in the absence of evidence to the contrary that presumption will prevail and preclude a recovery by a person injured by the use of such water, because of his contributory fault.

(Syllabus by the Judge.)

APPEAL from judgment, Circuit Court, Portage County, in favor of plaintiff.

Action to recover damages for the death of plaintiff's intestate alleged to have been caused by negligence on defendant's part, in that it failed and neglected to extend its intake pipe into Chequamegon Bay from time to time as needed to secure water free from sewage contamination, and suitable for domestic use, as required by its contract with the municipality of Ashland. It was claimed that, owing to the breach of duty mentioned, in March, 1894, defendant took from Chequamegon Bay water contaminated with typhoid fever germs and distributed the same to its customers in the city of Ashland, of whom the deceased was one; that without fault on his part, he used such polluted water taken from the service faucet at his residence, for drinking purposes, and was thereby stricken with typhoid fever from which he died. The facts mentioned were properly alleged in the complaint and put in issue by the answer. The facts established conclusively by the admissions in the pleadings or evidence given on the trial were, that the contract under which defendant's waterworks system was constructed and operated was made in 1884; that there was then no sewerage system in Ashland; that the contract required defendant to take its water supply from Chequamegon Bay and to extend the intake pipe in the bay from time to time, as the growth of the city of Ashland might require, to keep the water free from contamination by the sewage from such city; that three years after the waterworks system was installed, there was constructed a sewerage system in Ashland by which the sewage of the city was deposited in the bay, and such system was extended from time to time, and the amount of the

sewage thereby, and by the growth of the city, deposited in the bay from year to year down to the time of the occurrence complained of, was so increased that, with pollutions of like character which were drained into the bay from other sources, it was rendered practically impossible to secure therein with certainty, at all seasons of the year, a water supply suitable for domestic use; that as a result of the situation, for several years prior to the spring of 1894, at about the time of the break-up in the spring, there was an epidemic of typhoid fever in Ashland from using the bay water; that as early as 1891, it was generally accepted as true by the people of the city, that the water of the bay was contaminated with typhoid fever germs, and was the cause of the prevalence of typhoid fever, especially in the spring; that the danger of taking the fever from using such water in the spring was notorious in 1894, and for some time prior thereto; that the subject was one generally talked about among the people and was discussed in the city press which was patronized by the intestate; that he had been a resident of the city for several years, was an intelligent workingman, and his attention had been specially drawn to the subject of typhoid fever by reason of his wife having been afflicted with it about six months prior to his sickness; that he knew the source of defendant's water supply, and used the water freely without any effort to free it from dangers of sewage contamination. The evidence further shows that deceased was away from home all of the time for about four days prior to his sickness becoming so pronounced as to require him to desist from working, and that prior to such four days he was absent from home during the working time of each day. There was considerable evidence given by experts for the purpose of showing the condition of the bay water, and the probability that the death of the intestate was caused by using it. Numerous exceptions were taken to the rulings on questions propounded to the experts and to other rulings on the admission and rejection of evidence. At the close of plaintiff's case there was a motion for a nonsuit made and denied, and the question raised by such motion was again raised by a motion to direct a verdict in defendant's favor at the close of the evidence on both sides. The jury rendered a special verdict, finding, among other things, that the deceased died from typhoid fever, caused by drinking water drawn from the faucet in his house; that typhoid fever was epidemic in the city in 1892 and 1893, and that defendant knew, or ought to have known, that the water it furnished was dangerously contaminated with typhoid germs; that it could have procured wholesome water from Chequamegon Bay prior to the sickness of the deceased; that the deceased was without fault

in using the water, and that it was publicly and widely stated and believed among the citizens of Ashland, prior to the occurrence complained of, that the typhoid fever epidemics in the city of Ashland were attributable to the water furnished by the defendant. All other issues requisite to plaintiff's recovery were found in her favor, and damages assessed at \$5,000.

TOMKINS & MERRILL and LAMOREUX, SHEA & WRIGHT, for appellant.

CATE, SANBORN, LAMOREUX & PARK, for respondent.

The points decided are stated in the syllabus by the court.

Judgment reversed.

Opinion by MARSHALL, J.

HYER V. CITY OF JANESVILLE.

Supreme Court, Wisconsin, December 16, 1898.

MUNICIPAL CORPORATION — CARE REQUIRED OF ICY SIDEWALK.

— A municipality can no more be expected to guard against the mere rough condition of a walk caused by the sudden freezing of a thin coating of soft and sloppy snow thereon, than against the slippery condition caused by a smooth surface of ice on the walk.

SAME — DEFECTIVE SIDEWALK. — Where the evidence showed that a board sidewalk was covered with snow to the depth of two inches, and during a warm spell of weather the snow melted, and when a cold spell of weather followed, the melted snow froze with indentations of footprints made while the snow was soft, and the plaintiff, while walking over the sidewalk, fell by reason of its condition, there was insufficient evidence to warrant the jury in finding that the rough condition of the walk was the cause of the fall and its mere slipperiness would not warrant a finding in her favor, and therefore a verdict for plaintiff was set aside (1).

1. See NOTE OF RECENT CASES AGAINST MUNICIPAL CORPORATIONS FOR INJURIES SUSTAINED BY REASON OF DEFECTIVE SIDEWALKS, in 3 Am. Neg. Rep. 741-743.

See also, NOTE ON LIABILITY OF CITY FOR DEFECTIVE SIDEWALK, in 3 Am. Neg. Rep. 304-305.

See also, NOTE OF RECENT CASES RELATING TO DEFECTIVE HIGHWAYS, in 4 Am. Neg. Rep. 268-270.

See also, NOTE OF CASES AGAINST MUNICIPAL CORPORATIONS IN WISCONSIN, in 4 Am. Neg. Rep. 96-100.

The following are some recent cases arising from Accidents occasioned by Defective Sidewalks:

In *CITY OF JOLIET v. JOHNSON* (Supreme Court, Illinois, December, 1898), 52 N. E. Rep. 498, where there was an allegation in the declaration that the planks of a sidewalk were broken and unfastened, and the proof showed that some of the planks were unfastened and that the fall resulted from this, it was held not to be a variance though there was no proof of any planks being broken. There was also no variance

APPEAL from the Circuit Court for Dane County.

Action to recover compensation for personal injuries alleged to have been caused plaintiff (Victoria Hyer) by insufficiency and want of repair of a sidewalk in defendant city. The insufficiency alleged consisted of an accumulation of snow and ice, three to ten inches deep on the walk for the whole width and for considerable length thereof, existing for several weeks prior to the injury, to the knowledge of the street commissioner, worn by reason of travel thereon uneven and rough and formed into high ridges. The circumstances

where the allegation was that the right knee of plaintiff was dislocated and she became sick, lame, disordered, and permanently injured, and the proof was that plaintiff's knee impinged against a protruding nail causing a jagged wound above the cap and a swelling of the limb and varicose veins.

In *CITY OF HUNTINGTON v. BURKE* (*Appellate Court, Indiana, December, 1898*), 52 N. E. Rep. 415, a complaint in an action for injury resulting from a defective sidewalk, containing a description of the hole in a sidewalk and the time it had negligently been allowed to exist, and averring that in traveling along the walk without negligence or any knowledge of the hole, plaintiff stepped into it, was sufficient to show that the injury was caused by the city negligently failing to repair the defect.

In *CITY OF COLUMBIA CITY v. LANGOHR* (*Appellate Court, Indiana, June, 1898*), 50 N. E. Rep. 830, it appeared that while walking along a board sidewalk carrying a baby in her arms and accompanied by her sister, the plaintiff tripped on a loose board which was thrown out of position by her sister stepping upon it. Several times the board had slipped to one side during the preceding five months, the nails having rusted off; but, upon being replaced, no defect was observable unless the loose board was stepped on. The walk was not inspected within five months of the date of the injury, and

its defective condition during that time was such that an examination would have revealed it. The plaintiff did not know its condition, and was walking carefully at the time. The city had no actual notice of the defect. The walk had been repaired the day before the accident occurred, but not all the loose boards were nailed down, which, by careful inspection, would have been discovered. *Held*, that the city was liable.

In *BUCHER v. CITY OF SOUTH BEND* (*Appellate Court, Indiana, May, 1898*), 50 N. E. Rep. 412, it was held that where a person received an injury by slipping on a loose brick, which was part of an old sidewalk and was on a level and completely surrounded by other bricks, and there were no bricks out of the walk, there was no apparent defect which the city, in the exercise of reasonable care, could have discovered, and it was not liable.

In *GRAHAM v. TOWN OF OXFORD* (*Supreme Court, Iowa, May, 1898*), 75 N. W. Rep. 473, it was held that an instruction that if the fall of plaintiff was caused by a loose plank on the sidewalk, as claimed, then it would be necessary for the jury to determine whether defendant was negligent, and whether plaintiff was in the exercise of ordinary care, was not erroneous because of the admitted fact that plaintiff knew of such defect before the accident, and could have avoided such danger by going another way, as knowledge on her part of such defect

of the injury, as alleged, were that plaintiff, while traveling with due care, struck her foot against one of the ridges of snow and ice, and was thereby made to fall upon the hard, irregular surface of the walk, severely bruising her back and head, and otherwise injuring her. The answer put in issue the allegations as to the insufficiency of the walk, and pleaded contributory negligence. The evidence showed that the walk had been uniformly cleared off whenever there was a fall of snow during the winter, except it was not cleaned down to the plank surface, there being left some snow which, by

did not render her necessarily guilty of negligence in attempting to pass over it.

In *BARCE v. CITY OF SHENANDOAH* (*Supreme Court, Iowa, October, 1898*), 76 N. W. Rep. 747, it was held that plaintiff could not recover for injuries sustained from a fall on a sidewalk due to its unevenness where it was shown that plaintiff had passed over the walk frequently, and had once before fallen at the same place and could readily have detected the defect in passing.

In *MARSHALL v. CITY OF BELLE PLAINE* (*Supreme Court, Iowa, October, 1898*), 76 N. W. Rep. 797, it was held that one who, knowing the icy condition of an apron connecting a street crossing and sidewalk, and built without cleats at an incline of fourteen inches for seven feet, stepped on it, where he easily could have gone round it, was guilty of contributory negligence.

In *DAVIS v. CITY OF HOLTON* (*Supreme Court, Kansas, November, 1898*), 54 Pac. Rep. 1050, plaintiff's testimony on direct examination was to the effect that he knew the board sidewalk had been out of repair, but had been informed that it was repaired and that he was exercising care at the time of the injury. *Held*, that the direction of a verdict for defendant before plaintiff had rested was erroneous.

In *CITY OF LAWRENCE v. DAVIS* (*Kansas Appeals, December, 1898*), 55 Pac. Rep. 492, it was held that holes in a board sidewalk, occasioned by broken

or decayed and removed pieces therefrom, although but a few inches in depth, may be, in legal contemplation, such defects as to render the city liable for injuries resulting therefrom.

In *HILTON v. CITY OF BOSTON* (*Supreme Judicial Court, Massachusetts, June, 1898*), 51 N. E. Rep. 114, the evidence tended to show that there had been a snowstorm two days before the accident, and it was disputed whether the sidewalk had been cleared or whether a ridge of hard snow remained in the center. About six o'clock in the evening the plaintiff fell upon the walk and was injured. She testified "that just before she fell she was walking as she usually walked, and was looking straight ahead towards Park street, the direction in which she was going." After the jury were instructed that due care was that degree which a person of ordinary prudence would exercise under the same circumstances and that it depended on the situation, a refusal to charge that if the jury, in consideration of the circumstances attending the accident, should find no evidence of fault, due care might be inferred, was proper.

In *HARRIS v. CITY OF QUINCY* (*Supreme Judicial Court, Massachusetts, June, 1898*), 50 N. E. Rep. 1042, in which the plaintiff recovered a verdict for injuries caused by slipping upon rough ice on the sidewalk of a public highway at night, photographs of the sidewalk taken the following morning, and offered by the defendant, were

tramping, had accumulated quite evenly to the depth of about two inches; that while in such condition it became soft, and was tramped over, leaving footprints therein, when it froze, leaving the walk in a hubby condition, there being depressions all over it to the depth that footprints would naturally make under such conditions. One of the plaintiff's witnesses said the walk was kind of icy, with lumps big as one's fist; that it was hard to walk on, that it had been soft, and people had walked on it, and then it froze, leaving

properly rejected, if it appeared from inspection that they did not represent the slipperiness or the roughness of the ice, or the quantity of it in such a way as to be instructive.

In *ROGERS v. VILLAGE OF ORION* (*Supreme Court, Michigan, March, 1898*), 74 N. W. Rep. 463, it was held that notifying a member of the street committee of a loose plank in a sidewalk without specifying the location, is not sufficient to constitute notice of such defect to the village.

In *COMISKIE v. CITY OF YPSILANTI* (*Supreme Court, Michigan, March, 1898*), 74 N. W. Rep. 487, there was no crosswalk on one side of a street, but a beaten pathway only. Within a few feet of this path was an open ditch about twenty inches deep, and plaintiff, while attempting to cross the street on a dark night, got off the path and fell into the ditch. There was a crosswalk on the other side of the street, which plaintiff was aware of, and could have used with safety. *Held*, that the court erred in directing a verdict for defendant.

In *RODDA v. CITY OF DETROIT* (*Supreme Court, Michigan, June, 1898*), 75 N. W. Rep. 939, it was held that a city must be presumed to have had notice of the defective condition of a board sidewalk which had been out of repair for several months. It was also held that the plaintiff had a right, on the question of notice, to show the general bad condition of the walk in front of premises almost in front of which the defective plank was placed.

In *WESLEY v. CITY OF DETROIT* (*Supreme Court, Michigan, July, 1898*), 76 N. W. Rep. 104, it was held that a municipality is not liable for injuries resulting from an inclined sidewalk being made unsafe by the natural accumulation of ice and snow.

In *HALL v. CITY OF AUSTIN* (*Supreme Court, Minnesota, July, 1898*), 75 N. W. Rep. 1121, it was held that the jury was justified in finding the city authorities guilty of negligence where the evidence showed that the walk had become so badly decayed that the stringers underneath the plank had almost rotted away and become incapable of holding the nails with which the planks had been fastened to them; that the end of a plank was likely to fly up when the other end was stepped on; and that this condition, gradually becoming worse, had existed for quite a long time. "Courts will take notice of the fact that the decay of wood is a gradual process."

In *CITY OF FRIEND v. BURLEIGH* (*Supreme Court, Nebraska, February, 1898*), 74 N. W. Rep. 50, the plaintiff's testator fell off a sidewalk at a point where it crossed a ravine some ten feet deep and fifty feet wide, receiving injuries from which he died, and the plaintiff contended that the proximate cause of testator's death was the negligent failure of the city to provide the sidewalk where it crossed the ravine with railings or to keep at night on said walk at said place some light. A judgment for plaintiff was affirmed.

In *CITY OF HARVARD v. STILES* (*Su-*

little bunches. Another witness said the walk was made rough by people walking on the soft snow, leaving footprints which froze; that the Tuesday before the injury the walk was not that way; that the depressions in the surface were caused by the heels of shoes going down to the counter. There was considerable evidence of like character. Soon after the accident and before any material change had taken place in the walk, it was photographed and the result was produced in evidence, corroborating what has been stated, except the indentations in the walk, were not sufficient to

preme Court, Nebraska, March, 1898), 74 N. W. Rep. 399, the plaintiff was injured by falling upon a board walk which she alleged was allowed to remain out of repair for a year. The city alleged that the walk was a temporary one, and gave a description of the material used in its construction; that the plaintiff had frequently passed over the walk and that the city was without actual notice of the defects. A verdict was rendered for plaintiff.

In *ASLEN v. VILLAGE OF CHARLOTTE* (*Supreme Court, Appellate Division, New York, 1898*), 54 N. Y. Supp. 754, where it appeared that the stringers holding the boards on a sidewalk were decayed so as not to hold securely nails driven into them through the planks, the defect was a danger which ought to have been foreseen by the exercise of reasonable care, so as to make the municipal corporation liable for injuries to pedestrians therefrom.

In *MILLER v. CITY OF BRADFORD* (*Pennsylvania, May, 1898*), 186 Pa. St. 164, it was held that the case was for the jury where the evidence for the plaintiff showed that she was injured by stepping on a ridge of ice about eight inches high, which had formed from water dropping from the eaves of an abutting building, and the evidence was conflicting as to whether the general sidewalks of the city were slippery and icy from rain suddenly turning to ice and as to whether the plaintiff knew of the dangerous character of the locality.

In *SHALLCROSS v. CITY OF PHILADELPHIA* (*Pennsylvania, July, 1898*), 40 Atl. Rep. 818, the plaintiff was held to be guilty of contributory negligence where it appeared that a hole in a sidewalk had been filled up with a stone which projected about four inches above the pavement; that near the hole a number of bricks had been displaced and were lying around loose, and that while walking along the sidewalk in the daytime, plaintiff struck her foot against the stone and was injured, and it further appeared that had she looked, she could have seen the stone. The court cited *Robb v. Connelville Borough*, 137 Pa. St. 42; *Lumis v. Traction Co.*, 181 Pa. St. 268; *Canavan v. Oil City*, 183 Pa. St. 611.

In *COOPER v. VILLAGE OF WATERLOO* (*Supreme Court, Wisconsin, February, 1898*), 4 Am. Neg. Rep. 98, 74 N. W. Rep. 115, a portion of an inclined sidewalk in defendant village had ice and snow thereon to such depth that the cleats thereon were covered. In the morning, while going down the incline, plaintiff slipped and fell. She had passed over the sidewalk in the opposite direction about an hour previous, and observed that it was very slippery. The walk was not slippery prior to the previous night, but became so during the night, by reason of a mist, followed by a slight flurry of snow. *Held*, that the plaintiff could not recover for her injuries.

be clearly perceptible in the photograph. It showed the walk covered with a thin coating of snow and ice, tramped to a uniform level for the whole width, and not entirely smooth, but without irregularities, as stated, sufficient to be clearly perceptible in the picture. The evidence of how the accident occurred was that while plaintiff was walking on the sidewalk she suddenly fell backward, striking first on her hips, then on the back of her head near the top. The court was requested to direct a verdict in defendant's favor, which was refused. The jury rendered a verdict for plaintiff, on which judgment was rendered. There was a motion before judgment to set the verdict aside and for a new trial, which was refused, and the ruling duly excepted to.

F. C. BURPEE, for appellant.

J. J. CUNNINGHAM, for respondent.

MARSHALL, J. — Appellant contends that the trial court should have directed a verdict for defendant because of an entire failure of proof to sustain the allegations of the complaint, as regards failure of duty on defendant's part respecting the safety of the walk, and that the injury complained of was occasioned thereby. The complaint states a case well within the authorities as to actionable failure of duty respecting sidewalks, by allowing an accumulation of snow and ice thereon in such form as to constitute an obstruction to public travel independent of a mere slippery or rough condition caused by ice and snow. It states that for a long time prior to the accident there was an accumulation of snow and ice from three to ten inches deep extending clear across the walk; that it was rough, uneven and in high ridges, and that such condition had existed for several weeks, but we look into the evidence in vain to find testimony to sustain such allegations. The most the evidence shows is that a few days before the injury there was a coating of about two inches in depth of snow, packed hard evenly over the walk by travel; that the walk had been in that condition for some time; that the weather turned warm causing the snow to become soft, wet and sloppy, and then suddenly turned cold, causing ice to form with such footprints therein as would naturally be made by travel under such conditions. The bed of ice and snow three to ten inches deep, mentioned in the complaint, does not appear to have been observed by witnesses, nor the high ridges spoken of, nor the long-continued defective condition. True, the evidence shows that the walk had not been entirely free from snow since soon after the commencement of the winter season, but it was free except as stated. A small amount accumulated from frequent falls of snow so that, in its tramped condition, it was about two inches deep. That did not in

any way interfere with public travel, or constitute any obstruction to such travel, or defect in the walk. It was such an accumulation of snow as is usually found on walks in the resident portions of cities and villages in the winter season in this climate.

If the walk was defective at all at the time of the injury, it was wholly caused by the sudden freezing of the soft, slushy snow, spread evenly over it except as it was indented by footprints therein. Reasonable care did not require the walk to be scraped clean, down to the planking, or that mere footprints made in the soft snow and froze in that condition should be removed. They did not cause any obstruction to or render travel on the walk dangerous, tested by the standard of reasonable safety under the circumstances. The furthest the courts have gone on this question is to hold that snow and ice allowed to accumulate on a walk in an uneven and ridgy condition so as to constitute an obstruction to public travel, renders it defective, and actionably so. Such was *Koch v. City of Ashland*, 88 Wis. 603, where snow had been permitted to accumulate upon the sidewalk until travel over it had formed a ridge twelve or fourteen inches high, which was rough and slippery. Also *West v. Eau Claire*, 89 Wis. 31, where there was a high ridge of ice formed on the walk by the course of travel, combined with a defect in the walk itself by reason of there being a hole therein. In *Perkins v. Fond du Lac*, 34 Wis. 435, it was held that hard snow and ice spread evenly over the surface of a walk does not constitute a defect; and to the same effect is *Grossenbach v. Milwaukee*, 65 Wis. 31; *Chamberlain v. City of Oshkosh*, 84 Wis. 289, and many other cases that might be cited, all going upon the ground that such a condition is so common and natural everywhere in this climate in the winter season, and the municipal authorities so powerless to prevent it, or, with any reasonable certainty, to remove it at all without great expense, that it would be exceedingly oppressive and unreasonable to require it. The test of public duty is to be made by what is reasonable under all the circumstances. So it has been held that mere slipperiness, caused by the formation of ice evenly on a walk, or a coating of snow and ice, may exist without constituting any defect in the walk inconsistent with full performance of public duty, and, necessarily, the same must be true as to what would necessarily and unavoidably follow from the existence of such a condition, that is, that the thin coating of snow would become soft in warm weather, then suddenly freeze, leaving a roughened surface caused by footprints. If some previous defect combine with the icy condition, then the situation is different, as in *Beaton v. Milwaukee*, 97 Wis. 416; or if by reason of use the walk becomes

worn into a dangerously uneven condition, as in *Paulson v. Town of Pelican*, 79 Wis. 445. In *Harrington v. City of Buffalo*, 121 N. Y. 147, we have a case quite like this. Snow accumulated evenly over the walk to the depth of several inches, then became soft, wet and sloppy, then suddenly froze hard, leaving the surface roughened by numerous footprints. In such situation the court said, in substance, that the walk presented no unusual appearance for cities in this variable and severe climate, and caused no more of an obstacle to reasonably safe passage of pedestrians than frequently exists in cities and villages during the cold season; and we may add, than may reasonably be expected by any person of average intelligence. A municipality could no more be expected to guard against the mere rough condition of a walk, caused by the sudden freezing of a thin coating of soft and sloppy snow thereon, than against the slippery condition caused by a smooth surface of ice on the walk.

On the subject of how the accident occurred the evidence is entirely silent. Plaintiff says she must have struck her heel against one of the lumps of ice and slipped and fell backward. That of course was not only an unreasonable conclusion from the situation, but was not evidence in the case to properly be considered by the jury. The effect of plaintiff's evidence is simply that while she was passing along the walk she suddenly fell backward and received the injury of which she complained. On that, and the evidence as to the rough condition of the walk, it was left to the jury to say whether plaintiff merely slipped upon the icy surface of the walk because of its general slippery condition, or was caused to fall by her feet coming in contact with an obstruction in the walk which rendered it defective and unsuitable for public travel. From the fact that the fall was backward, and there was nothing to indicate that it was caused by striking any obstacle in the walk, the theory that plaintiff's feet slipped forward on the icy surface is much more reasonable than any other that can be based on the evidence. If the fall were caused by the mere slippery condition of the walk, it is conceded that there would be no right to recover for the injury received. It has been said by this and other courts repeatedly, and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the party on whom the burden of proof rests, by

merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation by taking the case from the jury when requested so to do. *Sorenson v. Menasha Paper and Pulp Co.*, 56 Wis. 338; *Smith v. Railway Co.*, 42 Wis. 520; *Morrison v. Construction Co.*, 44 Wis. 405; *Taylor v. City of Yonkers*, 105 N. Y. 202; *Finkelston v. Railway Co.*, 94 Wis. 270; *Cawley v. Railway Co. (Wis.)*, not yet reported; *Asbach v. Railway Co.*, 74 Iowa, 248; *Railway Co. v. Schertle*, 97 Pa. St. 450; *Tyndale v. Railway Co.*, 156 Mass. 503, 31 N. E. Rep. 655; *Baulec v. Railway Co.*, 59 N. Y. 357; *Hughes v. Railway Co.*, 91 Ky. 526, 16 S. W. Rep. 275.

In a case like this it is incumbent upon the plaintiff to show by evidence, with reasonable distinctness, how and why the accident occurred. *Morrison v. Construction Co.*, *supra*. To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the most reasonable, comes far short of making a case. *Hayes v. Street R'y Co.*, 97 N. Y. 259. An examination of the numerous authorities cited will disclose that the principle of law does not admit of question or exception, that where there is no direct evidence of how an accident occurred, and the circumstances are clearly as consistent with the theory that it may be ascribed to a cause not actionable as to a cause that is actionable, it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict. As said in effect by the learned court in *Railway Co. v. Schertle*, *supra*, the direct effect of such a course of procedure would be to take the property of one person and pass it over to another by the mere form of law, ignoring the principles essential to make the administration of law and the administration of justice identical. The evidence here comes far short of what is said in many of the authorities cited to be clearly insufficient. The theory that plaintiff fell by reason of the walk being uneven is not as reasonable as that she fell because of its being merely slippery.

The conclusion reached is that there was a failure of proof as to the sidewalk being defective, and also a failure of proof as to whether plaintiff fell and received her injury by reason of the alleged defects in the walk. Hence, the court should have taken the case from the jury by directing a verdict in favor of the defendant, and for the same reason should have set the verdict aside and granted a new trial.

By THE COURT: The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

BRAGDON V. PERKINS-CAMPBELL CO.

Circuit Court of Appeals, United States, Third Circuit, April, 1898.

LIABILITY OF VENDOR TO THIRD PERSON FOR SALE OF DEFECTIVE ARTICLE. — In the absence of fraud or deceit the vendor of an article accepted by the vendee is thereby relieved from liability to third parties with respect to it.

ACTION BY WIFE OF VENDEE AGAINST VENDOR FOR INJURIES FROM DEFECTIVE ARTICLE. — Where a married woman sustained personal injuries caused by a defective side-saddle purchased by her husband for her use she had no cause of action against the vendor for its alleged negligence in making and selling the saddle.

ERROR to Circuit Court of United States for Western District of Pennsylvania. This was an action of statutory trespass brought by Cordelia R. Bragdon against the defendant for damages for injuries alleged to have been caused by a defective side-saddle sold and delivered to her husband for her use. The trial court granted a motion for compulsory nonsuit.

W. K. SHIRAS and C. C. DICKEY, for plaintiff in error.

GEORGE C. BURGWIN and THORNTON M. HINKLE (GEORGE N. CHALFANT and A. P. BURGWIN with them on the brief), for defendant in error.

DALLAS, CIRCUIT JUDGE. — The Perkins-Campbell Company, the defendant, sold and delivered to Albert R. Bragdon, the husband of Cordelia R. Bragdon, the plaintiff, a side-saddle; and in the statement of claim it is alleged: "The said defendant then and there promised and agreed with the said Albert R. Bragdon, acting in behalf of the said plaintiff, that the said side-saddle should be made by defendant especially for the use of the said plaintiff, and that by reason of said intended use by the said plaintiff he would take care to make and deliver a saddle of especial strength and safety, and constructed of the best material and by means of the best workmanship." Here there is alleged, simply and solely, an agreement to "take care;" but as the action is not *ex contractu* but *ex delicto* this allegation can be regarded only as a matter of inducement. The substantial averment, the gravamen of the declaration, is: "It became and was the duty of the defendant to make and deliver to the said Albert R. Bragdon for the use of the said plaintiff, as aforesaid, a safe, sound, strong and skilfully made saddle, made of the best material and with the best workmanship. But the said defendant, disregarding its duty in the premises, negligently and unskilfully

made and delivered to the said plaintiff, by the said husband, an unsafe, unsound and weak saddle," by reason whereof the plaintiff sustained injury and was damaged.

It thus appears, not only that the action sounds in tort, but also that the specific wrong declared upon is not deceit, but negligence; and, we may add, the record discloses nothing upon which the plaintiff could have recovered, if she had attempted to do so, either for breach of warranty or for deceit. We have, then, a case in which the essential element consists of a breach of duty; and the burden is on the plaintiff to prove facts sufficient to show what the duty is, and that the defendant owed it to her. 1 *Shear. & R. Neg.*, sec. 8; *Beach, Contrib. Neg.* 6; *Thomp. Neg.* (preface). Dr. Wharton (*Whart. Neg.*, sec. 24) defines a legal duty thus:

"That which the law requires to be done or forborne to a determinate person, or to the public at large, and is a correlative to the right vested in said determinate person, or in the public."

This definition may be properly applied to this case, and so applying it, it appears that the supposed right of the plaintiff must be rested upon the affirmance of the proposition that to her, as a determinate person, the defendant owed a duty to carefully construct the saddle in question. But this proposition cannot be sustained. In the leading case of *Langridge v. Levy*, 2 *Mees. & W.* 519, the father of the plaintiff had bought from the defendant a gun, which was represented by the defendant, who knew it was intended for use by the plaintiff, to have been made by a certain manufacturer, and to be a safe gun. It had not been made by the manufacturer named, and, while the plaintiff was using it, it burst, and wounded him. The court said:

"It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant;" and "we are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person, by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer."

The plaintiff's right of recovery was accordingly not sustained for breach of warranty or for negligence, but solely upon the ground that there had been fraudulent misrepresentation, and that the injurious consequence to the plaintiff was "the result of that fraud." This judgment was affirmed. 4 *Mees. & W.* 337. And the appellate court distinctly based its decision upon the same foundation as that which had been relied on by the court below. Thus, it plainly

appears that both courts dealt with *Langridge v. Levy* as a case of deceit, and carefully avoided affording any excuse for implication that they would have sustained it as for negligence. The reason for thus distinguishing between these wrongs is not stated in either of the opinions, but it is, we think, quite obvious. Ordinarily, where a vendee accepts the purchased article, the vendor becomes, by reason of such acceptance, relieved from liability to third parties with respect to it. The vendee assumes, and the vendor stands discharged of, responsibility to them. But, where the vendor is chargeable with deceit, — where he has induced the vendee's acceptance by false and fraudulent misrepresentations, — the latter cannot be said to have consciously taken upon himself any duty of care; and that duty, therefore, if existent, is not shifted from the vendor, and he consequently remains liable. In *Heaven v. Pender* (1883), 11 Q. B. Div. 503 (1), Brett, M. R., sought to lay down the rule:

“That whenever one supplies goods or machinery, or the like, for the purpose of either being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And if there be a neglect of such ordinary care or skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence.”

1. The facts in *Heaven v. Pender*, 11 Q. B. Div. 503, reversing 9 L. R., Q. B. Div. 302, were as follows: Defendant, a dock owner, supplied and put up a staging outside a ship in his dock, under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured. *Held*, that the plaintiff being engaged on work on the vessel, in the performance of which the defendant, as dock owner, was in-

terested, the defendant was under an obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained.

Held, also, by Brett, M. R., that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

It must be conceded that this proposition, if sound, would lend support to the contention of the plaintiff in error. But it is not sound. It affirms a view of the law which, in *Langridge v. Levy*, the court declined to adopt, and which was repudiated by a majority of the judges (Cotton, L. J., and Bowen, L. J.) in the case in which it was propounded. One of the judges last mentioned delivered, on behalf of both of them, an opinion, in which it is said:

"I am unwilling to concur with the master of the rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived. Take, for instance, the case of *Langridge v. Levy*, to which the principle, if it existed, would have applied, but the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In every case where the decision has been referred to, the judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in *Blakemore v. Railway Co.*, 8 El. & Bl. 1035 (1); and in *Collis v. Selden*, L. R. 3 C. P. 495 (2), Willes, J., says that the judgment in *Langridge v. Levy* was based on the fraud of the defendant; and this impliedly negatives the existence of the larger principle which is relied on; and the decision in *Collis v. Selden* and in *Longmeid v. Holliday*, 6 Exch. 761 (3), in each of which the

1. In *Blakemore v. Bristol & Exeter R'y Co.*, 8 El. & Bl. 1035, it was *held* that the duties of a gratuitous lender and borrower of a chattel are, in some degree, correlative. The loan must be taken to be for the purpose of a beneficial use by the borrower; and the borrower is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use and for anything which may be defined to be legal fraud. The lender is responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous or unprofitable to him.

2. In *Collis v. Selden*, L. R. 3 C. P.

495, it was *held* that a declaration alleging that the defendant negligently hung a chandelier in a public house, knowing that the plaintiff and others would be under it, and that unless carefully hung it would fall and injure them, and without warning the plaintiff of the dangerous way in which it was hung, whereby the chandelier fell on and injured him while lawfully in the public house, disclosed no cause of action.

3. The facts in *Longmeid v. Holliday*, 6 Exch. 761, were: A declaration by husband and wife stated that the defendant was the maker and seller of lamps called "The Holliday Lamp," and thereupon the husband bought of him one of those lamps to be used by his wife and himself in his shop, and that the defendant then fraudulently warranted that the lamp was reasonably fit and proper for that purpose, whereas the lamp was dan-

plaintiff failed, was, in my opinion, at variance with the principle contended for. The case of *George v. Skivington* [5 Exch. 1] (1), and especially what is said by Kleasby, B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and the case was decided by Kleasby, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which, as he said, the decision in *Langridge v. Levy* was based."

It is not necessary, for the present purpose, to further comment upon the English authorities. The reference made to some of them in the immediately preceding extract shows, we think, that in *Heaven v. Pender* the majority of the court were clearly right in declining to concur with the master of the rolls in laying down the larger principle which he entertained, and which, so far as it purported to be a deduction from the general rule as to negligence, has been disapproved by Sir Frederick Pollock in his standard treatise upon the Law of Torts. Pol. Torts (2d ed.), p. 375, note E. Upon careful examination of the decisions of the courts of England, and in view of the conclusion derived from them by so eminent an English lawyer as the author to whom we have just referred, it seems perfectly safe to assume that this action would not have been sustained there; and it appears to be equally clear that there is no material difference in this regard between the law of that country and our own. The judgment of the Supreme Court of Pennsylvania

gerous and unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded and injured her. At the trial it appeared that the accident arose from the defective construction of the lamp, but there was no proof that the defendant knew of the defect, and the jury found that he was not guilty of any fraudulent or deceitful representation: *Held*, that the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was with the husband alone.

1. The facts in *George v. Skivington*, L. R. 5 Exch. 1, were as follows: A declaration in an action by husband and wife alleged that the defendant, in the course of his business, professed to sell a chemical compound made of

ingredients known only to him, and by him represented to be fit to be used for hair wash, without causing injury to a person using it, and to have been carefully compounded by him; that the wife thereupon bought of him a bottle of this hair wash, to be used by her, as the defendant knew, and on the terms that it could be safely so used and had been carefully compounded. Breach: that the defendant so negligently and unskillfully conducted himself in preparing and selling the hair wash, that by reason thereof it was unfit to be used for washing the hair, whereby she, the wife, who had used it for that purpose, was injured. *Held*, that the declaration disclosed a good cause of action.

in the case of *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. Rep. 244, which was decided in 1891, is entirely satisfactory to us, and is, in principle, directly applicable. In that case the defendant had contracted to erect a certain hotel according to plans and specifications. The building was completed and accepted. Thereafter a girder, which in part supported its porch, gave way and the porch fell, injuring the plaintiff, who was a guest of the hotel. He sued the contractor, but it was held that he had no cause of action against him. His contention was that the accident was caused by the defective construction of the porch; that it was not according to plans and specifications; that the defects were not observable after the building was completed, and, in point of fact, were unknown to the hotel company when it accepted the building from the contractor. The court assumed the verity of these allegations (very like to those of the plaintiff in this cause), but held that the contractor was not liable to the plaintiff upon contract because there was no contractual relation between them, nor in tort because such liabilities must be confined "to the parties immediately concerned." The authorities in the several States are not all perfectly clear upon the subject, but it is unnecessary to refer to them further than has been done by the learned judge in the court below. As was said by the learned judge who delivered the opinion in the case last cited by us: "We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason."

The Supreme Court of the United States had before it, in the case of *Savings Bank v. Ward*, 100 U. S. 195, a case involving very similar considerations. A lawyer who for his client had erroneously certified the recorded title of certain real property was sued by another person who had suffered loss in consequence of his reliance upon the correctness of the certificate. The judgment of the court, so far as pertinent here, is well condensed in the head note, where it is said "that there being neither fraud, collusion, nor falsehood by A, nor privity of contract between him and C, he is not liable to the latter for any loss sustained by reason of the certificate." The court, in its opinion, applied this language: "He only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue for that neglect." Three members of the court dissented from the judgment, but apparently upon the ground that the attorney who gave the certificate was chargeable with knowledge that it was to be used in some transaction of his client with another person as evidence of the facts certified to, and that, therefore, the attorney should be held liable to such other person, not for negligently

performing his contract with his client, but for, in effect, certifying to the person with whom his client was dealing (the plaintiff in the case) a fact as true which, if he had exercised ordinary care, he would have known to be untrue, — in other words, that the attorney was chargeable with culpable ignorance where it was his duty to be informed, and, therefore, had committed a legal deceit, not only against his own client, but against the plaintiff as well.

The case of *Richmond and Danville Railroad Company v. Elliott*, 149 U. S. 266, though not directly in point, is worthy of examination in this connection. What is said in the opinion of the court at pages 271 and 272, 149 U. S., and page 837, 13 Sup. Ct. Rep., indicates, we think, that it was assumed that, except under special circumstances, the acceptance by the vendee of the subject of purchase and sale relieves the vendor from liability to a stranger for any injury to him from negligent construction of the thing sold. See, also, *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. Rep. 400. There are cases which may seem to qualify the principle which we have discussed, but which are quite consistent with it, and which, as is pointed out in *Curtin v. Somerset*, *supra*, have no application to such an one as that with which we are now concerned. They decide that one who deals with a thing which is inherently very dangerous, involving "death or great bodily harm to some person, as the natural and almost inevitable consequence" of lack of care, owes to the public at large the duty of extreme caution. Such a case is *Thomas v. Winchester*, 6 N. Y. 397 (1), which in England has been thought to go too far. Brett, M. R., in *Heaven v. Pender*, *supra*. But it is hard to see in what respect it goes further than *Dixon v. Bell*, 5 Maule & S. 198 (2), which was cited as a strong case, and apparently with hesitating acceptance, in *Longmeid v. Holliday*, 6 Exch. 761 (*supra*), where it was rightly held that, as

1. In *Thomas v. Winchester*, 6 N. Y. 397, it appeared that plaintiff was poisoned and made sick by a dose of belladonna given to her for dandelion, which latter had been prescribed by her physician. The druggist who sold same had taken it from jar labelled dandelion, which jar with its contents was bought by him from another druggist who had purchased it from defendant. The latter having bought the belladonna, put it into the jar, and labelled it dandelion. Verdict and judgment for plaintiff for \$800 affirmed.

2. In *Dixon v. Bell*, 5 Maule & S.

198, it was *held* that the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; the defendant was liable to damages in an action upon the case.

lamps are not in their nature explosive, liability for sale, without fraud, of an ill-made lamp, which exploded in use, is contractual only, and therefore does not extend to any person who could not sue on the contract, or on a warranty therein expressed or implied. See Pol. Torts, p. 440. In our opinion, *Thomas v. Winchester* was rightly decided; but that case, and the others which follow its lead, do not at all conflict with our present judgment. The article here in question is not, like a poisonous drug, which was the harmful agent in *Thomas v. Winchester*, inherently dangerous, but is, like the lamp in *Longmeid v. Holliday*, not in its nature hazardous.

The Circuit Court did not err in refusing to strike off the compulsory nonsuit which it had entered, and therefore the judgment is affirmed.

MONSARRAT AND OTHERS, RECEIVERS OF VALLEY RAILWAY COMPANY, V. KEEGAN.

Circuit Court of Appeals, United States, Sixth Circuit, April, 1898.

MASTER AND SERVANT — RAILWAY COMPANY CONTRACTING TO PLANK BETWEEN RAILS AT STREET CROSSING. — While there is no general duty requiring a railway company to plank between its rails, yet a railway company that accepts certain street rights on condition that it would plank between its rails those portions of the public streets used by it, is under a duty to so put down the planks and so maintain them when down that they should be reasonably safe to its employees who might be required to work thereon.

RISK OF EMPLOYMENT. — Before a court is authorized to presume as a matter of law that an employee accepts the dangers incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect and its dangers, or that he continued in the service after he acquired knowledge or by due care and reasonable attention might have known of the danger (1).

1. The court distinguished the case of *Gleason v. N. Y. & N. E. R. R. Co.*, 159 Mass. 68, 34 N. E. Rep. 79, and in the course of its opinion said: "The case of *Gleason v. Railroad Co.*, 159 Mass. 68, has many features in common with this case, and therefore has been much relied upon by plaintiffs in error. But in that case there was no conflict as to the facts from which knowledge was to be presumed. The

exception assumed the existence of a space of three and one-half inches in the planking of a track in a yard over a waterway, at the time of Gleason's employment. This space was near a switch which was tended by Gleason in a yard only 500 feet long and forty feet wide. On these admitted facts, Gleason was presumed to have accepted the risk. The case is possibly an extreme one. To reverse in this

BRAKEMAN INJURED WHILE COUPLING CARS BY STEPPING IN HOLE ALONGSIDE TRACK. — K., the plaintiff, was a brakeman and had been employed by the defendant for several years. At the time of the accident, and for two months prior, he was employed in a railway yard a mile long and containing twenty-two tracks. Two of these occupied portions of a public street, and the injury occurred where these tracks crossed the sidewalk of the street. At this crossing, and in the street, the tracks were planked between the rails. At the outer side of the sidewalk there was a space between this planking and the rail of between three and three-quarters and four inches in width at its widest part, and a depth of seven inches, and it had so existed for at least two months. It was K.'s business to make all couplings that fell to his crew, and he had passed over that part of the roadbed many times a day. As he was attempting to couple a moving car to a stationary one, he stepped out from between them and his foot was caught in this space between the planking and the rail so tightly that he was unable to remove it before it was run over and crushed. There was a verdict for the plaintiff, and upon a writ of error to review, the court *held*: 1. That it was a question for the jury whether the hole was a dangerous defect in the roadbed. 2. That it was not reversible error to admit evidence of the condition upon which the company had acquired its street rights. 3. That the hole in which the plaintiff's foot was caught was not such an obviously dangerous defect in the roadbed that in view of his long employment in the yard the court should have directed a verdict against him. 4. That the question of whether the existence of the dangerous space was so obvious as to make the plaintiff's ignorance of it inexcusable, was properly submitted to the jury, and the facts did not make a case where the court could justifiably say that the plaintiff's ignorance of the dangerous character of the space in the roadbed was unjustifiable in law, and his acceptance of the risk presumed.

ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

KLINE, CARR, TOLLES & GOFF, for plaintiffs in error.

MEYER & MOONEY, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

The facts and points decided are stated in the syllabus.

Judgment affirmed.

Opinion by LURTON, CIRCUIT JUDGE.

case would require us to go even beyond that ruling. On this record we could not justifiably assume the existence of this hole when Keegan accepted employment. Knowledge of the existence of such a hole in the roadway might be presumed as matter of law from employment in a yard 500 feet long and forty feet wide, which would be unjustifiable in a yard a mile long and containing twenty-two tracks."

**CONTINENTAL TRUST COMPANY OF NEW YORK
V. TOLEDO, ST. LOUIS AND KANSAS CITY
RAILROAD COMPANY.**

Circuit Court of Appeals, United States, Seventh Circuit, May, 1898.

MASTER AND SERVANT—STORAGE OF CARS ON TRACK HAVING STEEP GRADE—EMPLOYEE STRUCK BY ESCAPING CAR. — A railway company that stores heavily loaded coal cars upon a side track having a dangerous grade without taking any other precaution than setting the brakes on the first car to prevent their escape to the main track is guilty of negligence and liable for the death of an employee who was struck by one of the cars, though the employee had released the brake of the car in the course of his duties, and had failed to set the brake again, it not being shown that he knew of the grade or that the brakes had been set up only upon one of the cars.

APPEAL from Circuit Court of the United States for the Southern District of Illinois.

CLARENCE BROWN, for appellant.

R. E. HAMILL, for appellee.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

BAKER, DISTRICT JUDGE. — This is an appeal by the receiver from a decree on an intervening petition filed by Walter Bartlett, administrator of the estate of Michael Delaney, deceased, to recover for damages sustained by the next of kin on account of the death of the decedent. The alleged negligence consisted in the construction and maintenance of a side track used for storing loaded coal cars, having a dangerous grade, extending from a coal shaft for about 600 feet to its point of junction with the main track, and in failing to provide suitable means to secure such loaded cars on the said track, in consequence of which one of them ran down upon or so near the main track that the decedent, a brakeman, who was standing on the step on the side of the engine, was struck thereby, and instantly killed. The accident occurred on the night of December 15, 1893. Delaney, at the time he was killed, was an extra freight brakeman, employed on the west end of the road. He had been employed in that capacity less than two months and had made but a few trips over the road. Prior to that time he had been employed in the yards at Charleston. He was a strong, capable, and bright young man, about twenty years of age, but with little

experience as a brakeman. At the time of his death, he was braking on a local freight train which handled the output of a coal mine on the line of the railroad at Sorrento, Ill. The mine was near the main track, and it had a daily output of about 400 tons. The scale level at the mine was two feet and seven inches higher than the main track at the point where the coal track joined it. The cars were placed on the scale level at the mine, and, when loaded, they were moved down the coal track to the east towards the point of junction with the main track. This coal track, having a length of about 600 feet and a descending grade of two feet seven inches, was used for storing heavily loaded coal cars. It had no derail switch, and no blocks were provided to prevent the loaded cars from running onto the main track. The grade was in the upper two-thirds of the coal track, and loaded cars were habitually left standing upon this grade without being blocked, and without their brakes being set. The car nearest the main track had its brake set, and it was relied upon to hold the other cars where were run down against it. On the night of the accident, there were fifteen or sixteen loaded coal cars thus placed on the coal track, covering almost its entire length. The train on which the decedent was employed had been directed to take up some cars at this place, and for that purpose the engine had gone onto the coal track, and coupled onto the nearest coal car. It is claimed that the decedent loosened the brakes on this car, and that when it was found that none of the cars wanted were on the coal track, and the engine was detached, the decedent neglected to set up the brake on the coal car, and that this failure caused the car to move down onto or near the main track, and thus brought about the accident.

Many errors are assigned, but all that are available present only two questions: First. Was the appellant chargeable with negligence in the construction and maintenance of the coal track, and in failing to provide suitable means to secure the loaded cars placed thereon? Second. Was the appellee's intestate guilty of contributory negligence? The master's duty is to exercise ordinary and reasonable care to furnish a reasonably safe working place for his employee, having regard to the danger of the service and the peril to which the employee will be exposed from the failure to exercise such care. From the brief review of the facts which we have given, we feel no doubt that the master failed in the performance of his duty. The grade of the coal track rendered it a dangerous location on which to place fifteen or sixteen heavily loaded cars without any means of preventing their escape onto the main track, except by the setting up of the brake on the car nearest thereto. The appellant, even if a

derail switch or blocks were not necessary, might and ought to have secured the cars by having the brakes set up on each one of them. Instead of that, the rule of the appellant only required the brakes to be set up on the one car nearest to the main track. He knew the character of the grade on the coal track, and the danger of cars escaping therefrom onto the main track, and, with this knowledge, he failed to exercise proper care to guard against it. The decedent had never been on this coal track but once before the night on which he was killed, and that in the nighttime, and he had no notice or knowledge of its dangerous condition. This danger was not one of the ordinary hazards of the service, and it was not one assumed by the decedent. The burden is on the appellant to show contributory negligence on the part of the appellee. This he has failed to do. Even if the appellee neglected to set up the brake when the engine pulled out onto the main track, still the evidence fails to show that he knew the condition of the coal track, or that the brakes had been set up only upon one of the cars. Being in ignorance of the appellant's negligence, he had a right to act on the assumption that the coal track was reasonably safe and suitable for the use to which it was put, and that the cars stored thereon were so secured that they would not run out upon the main track. Especially is this so in view of the fact that that part of the coal track where the decedent was employed on the night of the accident was on a level grade, and he had no knowledge but that the entire coal track was on the same grade.

On the argument at bar it was suggested that the damages were excessive. No such question was presented in the motion for a new trial in the court below, nor has it been assigned as an error in this court. Under these circumstances, we do not feel called upon to examine this question. We find no available error in the record.

The decree of the court below is affirmed, at the cost of the appellant.

DENNING V. STATE.

Supreme Court, California, January, 1899.

STATUTE — CLAIM AGAINST STATE — ACTION AUTHORIZED. — Section 1 of the act of 1893, p. 57, which authorizes an action to be brought against the State for a claim not allowed by the board of examiners, does not create any liability or cause of action which did not exist before.

SAME — HARBOR COMMISSIONERS — INJURY TO EMPLOYEE. — St. 1889, p. 380, giving power to the State harbor commissioners to collect tolls and charges as will enable them to discharge their duties of controlling the Bay of San Francisco does not affect the character of the board as a governmental agency and make the State liable to an employee who was injured through the negligence of the board (1).

STATE NOT LIABLE FOR INJURY TO EMPLOYEE OF BOARD WHOSE DUTIES WERE GOVERNMENTAL. — Among other duties of the board was that of extinguishing fires, and that being undoubtedly governmental, and plaintiff specially employed in that service, he could not recover from the State for the negligence of the board, though it was acting administratively in collecting wharfage.

DEPARTMENT 2. Appeal from judgment, Superior Court, City and County of San Francisco, in favor of plaintiff.

ATTORNEY-GENERAL FITZGERALD, for the State.

R. R. BIGELOW, HENLEY & COSTELLO, and EDW. J. BANNING, for respondent.

1. *The following are some recent cases in which was presented the question whether the municipal corporation was acting in its governmental capacity or not:*

JUDGE BEAN says in his opinion in *CIGAR CO. v CITY OF PORTLAND, (CAL.)* 55 Pac. Rep. 962: "There is a well established distinction made by the authorities between the liability of a municipal corporation for the acts of its servants, agents, officers, or employees done in the exercise of powers and duties granted to or imposed upon it as a mere agency of the State, and performed exclusively for public governmental purposes, and acts done in the exercise of powers granted to or privileges conferred for its own profit, advantage and emolument, although inuring incidentally to the public."

See *Quill v. Mayor, etc., of N. Y.*, reported in this volume of AM. NEG. REP. *post*.

A municipal corporation is not liable in damages for the death of one convicted in a corporation court and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with the proper medical attention and treatment. *NISBET v. CITY OF ATLANTA*, 97 Ga. 650.

A city is not liable for unlawfully arresting and imprisoning a person

PER CURIAM. — The plaintiff, Denning, was employed by the board of state harbor commissioners as a night deck hand upon a tugboat — the Governor Irwin — belonging to the State and used by said board. Among other duties of the plaintiff as a deck hand, it is alleged he was required to place lights on the top of the cabin on each side, and for this purpose climbed a ladder eight or nine feet

and incarcerating him in a filthy and improperly built and kept calaboose, since the municipality can only act through its officers and agents and is not responsible for their illegal acts in attempting to exercise police powers. **BLAKE v. CITY OF PONTIAC**, 49 Ill. App. 543.

A municipal corporation is not liable for the acts of a police officer while performing his duty in making an arrest of one charged with the violation of an ordinance. **VAUGHTMAN v. TOWN OF WATERLOO**, 14 Ind. App. 649.

A city is not absolved, as a governmental agency, from liability for a nuisance caused in cleaning streets by dumping unhealthy refuse near plaintiff's house, on the theory that street cleaning is a duty, and a public benefit in which plaintiff shared. **CITY OF NEW ALBANY v. SLIDER** (*Appellate Court, Indiana, January, 1899*), 52 N. E. Rep. 626.

It is the settled law of this State that incorporated towns are liable for injuries occurring from defective streets or sidewalks. **TOWN OF WILLIAMSPORT v. LISK**, (*Appellate Court, Indiana, January, 1899*), 52 N. E. Rep. 628.

Where in making a contract for macadamizing its streets a certain stipulated price per square yard was deducted by a city from the estimate for the use of the city's steam roller, and the city's agents used the roller without suggestions from the contractor, and the city retained its stipulated price, the city could not escape liability for a fire set by sparks from the roller, on the ground that the roller was used for the benefit of the public. **MCMAHON v. CITY OF DU-**

BUQUE (*Supreme Court, Iowa, December, 1898*), 5 AM. NEG. REP. 147.

A town is not liable for injuries to a traveler who was thrown out of his wagon by his horse taking fright at a steam roller used in repairing a street. **LANE v. CITY OF LEWISTON**, (*Supreme Court, Maine, January, 1898*), 39 Atl. Rep. 999.

A city is liable to the owner of a farm bounded by a running stream across which the city erected a dam under powers granted by the legislature in connection with its water supply, when the water was forced back upon the farm by the obstruction and certain fencing and crops were destroyed. **MAYOR, ETC., OF BALTIMORE v. MERRYMAN**, (*Court of Appeals, Maryland, January, 1898*), 39 Atl. Rep. 98.

A child, attending a public school in a school house provided by a city, under the duty imposed upon it by general laws, cannot maintain an action against the city for an injury suffered by reason of the unsafe condition of a staircase in the school house, over which he is passing. **HILL v. CITY OF BOSTON**, 122 Mass. 344.

The city of Boston was not liable for an injury to an employee of the Boston Transit Commission that was engaged in building a subway under a statute of the State authorizing it, where the city had no control over the commissioners or the manner in which the work should be done or in fixing the charges to be collected though the surplus after certain expenses were paid was to be used to maintain the public parks. **MAHONEY v. CITY OF**

high, reaching from the deck to the top of the cabin; that the ladder was insecurely fastened, and became detached at one side, and caused the plaintiff to fall, whereby he sustained serious injuries, and to recover damages therefor he brought this action, alleging that it was caused by the negligence of the defendant. The defendant demurred to the complaint, upon the ground that it did not state

BOSTON (*Supreme Judicial Court, Massachusetts, June, 1898*), 4 AM. NEG. REP. 395.

A city is responsible for the negligence of water commissioners who were acting as its agents in digging a ditch, in leaving excavations in the streets insufficiently lighted and guarded. *FOX v. CITY OF CHELSEA* (*Supreme Judicial Court, Massachusetts, May, 1898*), 50 N. E. Rep. 622.

A municipal corporation is not liable for maintaining its lockup or prison in a defective condition whereby a prisoner was injured. 62 Minn. 278.

So far as the city of Minneapolis maintains its water plant for use by its fire department in extinguishing fires, it is performing a public or governmental function, and is not liable for the negligence of its officers and servants in permitting the pipes and hydrants to become clogged and choked with sand, bark and other refuse, so that no water could be obtained, and plaintiff's goods were burned in consequence. *MILLER v. CITY OF MINNEAPOLIS*, (*Supreme Court, Minnesota, December, 1898*), 5 AM. NEG. REP. 183.

A city is not liable for damages sustained by a property owner because it failed to prevent the erection of a wooden building on an adjoining lot, in violation of an ordinance. *HARMAN v. CITY OF ST. LOUIS*, 137 Mo. 494.

An employee of the Monroe County Insane Asylum provided by the county for its insane, cannot maintain an action against the county for injuries received while operating a steam mangle in the laundry through alleged negligence of employees of the county as it was engaged as a politi-

cal division of the State in the discharge of a public duty. *HUGHES v. COUNTY OF MONROE*, 147 N. Y. 50.

A county cannot by any rule of law as established in this State be held liable at the suit of a private individual, who has received personal injuries from a defective bridge with the maintenance of which the county was chargeable. *MARKEY v. COUNTY OF QUEENS*, 154 N. Y. 675.

The rule of *respondeat superior* does not apply to the relation existing between the board of education of a union free school district and an "attendance officer" appointed by the former in compliance with the Consolidated School Law, and the board of education is not liable for the act of such "attendance officer" in wrongfully arresting a scholar by reason of which in his efforts to escape along the line of a railroad, the scholar is killed. *REYNOLDS v. BOARD OF EDUCATION, ETC., OF LITTLE FALLS*, (*Supreme Court, Appellate Division, New York, July, 1898*), 33 App. Div. 88.

Where a person was arrested for violation of a village ordinance and imprisoned in a place negligently permitted to become and remain so dilapidated that in consequence of the exposure he contracted a disease which caused his death, the village was not liable for the omission of its duty in the exercise of its governmental functions. *EDDY v. VILLAGE OF ELLICOTVILLE*, (*Supreme Court, Appellate Division, New York, December, 1898*), 35 App. Div. 256.

If the authorities of a town provide in its prison the necessities to protect a prisoner from bodily suffering, but

facts sufficient to constitute a cause of action. It was overruled by the court, and the defendant answered. A jury trial was had, and the plaintiff had judgment, from which, and from an order denying a new trial, the defendant appeals.

The most important question in the case is whether the State is liable for the negligence of the board of State harbor commissioners. whereby the plaintiff, an employee, it is alleged, was injured. This question was raised by the defendant by demurrer to the complaint, by motion for nonsuit, by a request to instruct the jury, and by a specification that the evidence does not justify the verdict. The complaint alleges that the plaintiff was employed by said board "as a night deck hand on a steam towboat, owned by the State of California, and operated by it in and upon the waters of the Bay of San Francisco, through its servants, the said board of State harbor commissioners;" but for what specific purpose it was so operated is not

the custodians of the jail neglect or fail to supply him with such necessities, the town is not liable in damages for injury caused to the prisoner by such neglect or failure of the custodians provided it is not shown that the officers of the town were negligent in supervising the custodians. *SHIELDS v. TOWN OF DURHAM*, 116 N. C. 394.

A city is not liable for damages caused by the enactment and enforcement of a valid ordinance, though the ordinance shows an abuse by the municipality of a discretionary power with which it is vested. *ROSENBAUM v. CITY OF NEWBERN*, 118 N. C. 83.

Waterworks belong to a city in its private rather than its public capacity and it is for the jury to say whether the city was liable for the bursting of a water main causing plaintiff's property to be flooded where it was shown to have bursted before under ordinary pressure, and there was no unusual pressure at the time of the accident, and that water pipe when properly constructed and laid will not burst ordinarily when under such a pressure. *ESBERG-GUNST CIGAR CO. v. CITY OF PORTLAND*. (*Supreme Court, Oregon, January, 1899*), 55 Pac. Rep. 961.

A demurrer to a declaration was properly sustained where it was alleged that the complainant was negligently cared for while temporarily confined in a police station, as such negligence did not render the city liable, since in caring for persons under arrest, the city discharged a public duty. *KELLY v. COOK*, (*Supreme Court, Rhode Island, October, 1898*), 5 AM. NEG. REP. 94.

A municipal corporation being an agency of the State government, is not liable to an individual for trespass upon his property in laying a sewer pipe, in the absence of a statute imposing liability for such acts. *PARKS v. CITY COUNCIL OF GREENVILLE*, 44 S. C. 168.

A city is not liable for loss by fire through the fact that the fire department had been ordered to parade at a distant part of the city on the morning that the fire destroyed plaintiff's house and no response was made when he sent out the alarm. *IRVINE v. MAYOR, ETC., OF CHATTANOOGA*, (*Supreme Court, Tennessee, October, 1898*), 47 S. W. Rep. 419.

The owner of lands where a sewer discharges may bring successive actions against a city maintaining it for

alleged. Upon this subject, however, there was some evidence. Capt. Farley, who was in the immediate command of the boat at and before the time of the accident, testified: "There are two boats, and three crews. The day crew do the towing and attend fires, in case fire comes in, and the night crew does nothing but attend fire duty at night, except every third Sunday and every third holiday the night crew is on in the daytime." And the plaintiff testified: "I was night hand on that boat, in case of fire alarms," — and again: "The boat was head on at the time the accident happened, lying at the side of a wharf, ready for action when the alarm came in. The boat was tied up to a little dock at the end of Mission street."

The point made by appellant in the several ways above mentioned is that the boat was used as a governmental agency in promoting public interests, and that in such case the State is not liable for the negligence of its agents, the board of State harbor commissioners,

the nuisance thereby created. *CITY OF CHATTANOOGA v. DOWLING*, (*Supreme Court, Tennessee, October, 1898*), 47 S. W. Rep. 700.

A city is liable for the act of a superintendent of its waterworks who directed a private drain to be cut so that a pipe that was being laid might be imbedded therein and in time the sewage failing to pass the obstruction was backed up upon plaintiff's premises. *BRAGG v. CITY OF RUTLAND*, (*Supreme Court, Vermont, July, 1898*), 41 Atl. Rep. 578.

The stoppage of surface water by grading street and causing contiguous property to be overflowed is not an act on which an action for damages against the city can be predicated. *HARP v. CITY OF BARABOO*, (*Supreme Court, Wisconsin, December, 1898*), 77 N. W. Rep. 744.

See also the following:

Municipal corporations are not liable for the negligence or wrongful acts of health officers or boards of health. *Bryant v. City of St. Paul*, 33 Minn. 289; *Ogg v. City of Lansing*, 35 Iowa, 495; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; *Barbour v. City of Ellsworth*, 67 Me. 294.

Nor for the negligent acts of em-

ployees of the commissioners of public charities and correction. *Maxmilian v. Mayor, etc.*, 62 N. Y. 160.

Or of officers or members of their fire or police departments. *Hofford v. City of New Bedford*, 16 Gray (Mass.) 297; *City of New Orleans v. Abbagnato*, 62 Fed. Rep. 240; *Fisher v. City of Boston*, 104 Mass. 87; *Burrill v. Augusta*, 78 Me. 118; *Wilcox v. City of Chicago*, 107 Ill. 334; *City of Richmond v. Long*, 17 Gratt. 375; *Elliott v. City of Philadelphia*, 75 Pa. St. 347; *Gillespie v. City of Lincoln*, 35 Neb. 34; *Calwell v. City of Boone*, 51 Iowa, 687.

Nor for the negligent construction, maintenance or use of appliances for the extinguishment of fires. *Tainter v. City of Worcester*, 123 Mass. 311; *Edgerly v. Concord*, 62 N. H. 8; *Springfield Fire & M. Ins. Co. v. Keeseville*, 148 N. Y. 46; *Hayes v. Oshkosh*, 33 Wis. 314.

Nor for an injury caused by a negligent defect in a school building. *Ham v. Mayor, etc.*, 70 N. Y. 459.

Nor for an injury received by the giving way of the floor of a town house used for holding town meetings and other public purposes. *Eastman v. Meredith*, 36 N. H. 284.

or of its employee in the immediate control of the vessel. To this the respondent replies — first, that the Legislature intended, by the act of February 28, 1893, to make the State liable for the negligence of its officers and agents to the same extent that other corporations are liable; and, second, that, if the State is not responsible for the negligence of their officers or agents in the discharge of a strictly governmental duty, it is responsible for their negligence while they are in the discharge of purely administrative or business functions, and that they were so engaged at the time the plaintiff was injured. The first section of the act of 1893, relied upon by respondent, is as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the State not allowed by the State board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the State in any of the courts of this State of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided." St. 1893, p. 57. This statute has been considered by this court in at least two cases, arising under different facts, and in both it was held that said statute did not create any liability or cause of action against the State where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted. *Chapman v. State*, 104 Cal. 690, 38 Pac. Rep. 457; *Melvin v. State*, 121 Cal. 16, 53 Pac. Rep. 416. Respondent's first point cannot, therefore, be sustained.

Respondent's second contention concedes that an action will not lie against the State for injuries caused by the negligence of its officers or agents in the discharge of a purely governmental duty; but it is contended that said board was not engaged in the discharge of a purely governmental power, but was engaged in the discharge of a purely business function. By section 2504 of the Political Code, as amended in 1889 (St. 1889, p. 380), it is provided that "the commissioners shall have possession and control of that portion of the Bay of San Francisco, together with all the improvements, rights, privileges, easements and appurtenances connected therewith," for the purposes therein provided. Among other things, they are required to construct such number of wharves as the wants of commerce may require, and to repair and maintain all the wharves, piers, quays, landings, and thoroughfares, and to make such improvements as may be necessary for the safe landing, loading and unloading, and protection of all classes of merchandise, and for the safety of passengers passing into and out of the city of San Francisco by water, and to construct a sea wall, dredge slips, and docks to a

depth that will admit of the free ingress and egress of all classes of water craft, to perform which dredging the board is authorized to purchase or construct dredging machines, scows, steam tugs, and the necessary machinery, and employ men for operating the same. Said board is also authorized to fix and regulate, from time to time, the rates of dockage, wharfage, cranage, tolls, and rents, and collect such amount of revenue therefrom as will enable the commissioners to perform the duties required of them by the act, and for the purpose of collecting such revenue the board is authorized to appoint wharfingers and other officers. The board is also authorized to make rules and regulations in relation to the mooring and anchoring of vessels in said harbor, providing and maintaining free, open, and unobstructed passageways for steam ferryboats and other steamers navigating the waters of the bay, so that they can make their trips without impediment from vessels at anchor or other obstacles, besides many other things which need not be mentioned.

Article 15 of the Constitution contains the following provisions:

“Section 1. The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of the State.

“Sec. 2. No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary or other navigable water in this State, shall be permitted to exclude the right-of-way to such water whenever it is required for any public purpose nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

“Sec. 3. All tide lands within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations.”

These provisions of the Constitution clearly show that the State has retained the control of the harbors and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise, through which profits may accrue to the State treasury; and the statute creating the State board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain

circumstances, may give a cause of action against the State. The construction of sea walls, wharves, piers, boats, etc., requires contracts for material and labor, and the State is liable upon its contracts. And so the board is authorized to conduct the business of a wharfinger, collecting tolls and charges for loading and unloading freight upon its wharves, storage thereon, etc., a business that might be conducted by an individual or private corporation; but all such business necessarily involves matters of contract upon which the State may become liable. But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it, keeping open passageways for the ferryboats, controlling the anchorage of vessels, removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State, and connected with the wharves and piers, or used by said board. These duties are of a police character, and purely governmental. The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent "as will enable the commissioners to discharge the duties required of them by the act" does not affect its character as a governmental agency. In *Melvin v. State*, 121 Cal. 16, 53 Pac. Rep. 416, the plaintiff was a visitor at the State fair conducted by the State board of agriculture, and was injured by the seats giving way, the seats being insecure through their negligent and insecure construction. The board was authorized to charge, and did charge and receive, fees for admission; but it was said by this court, after stating that fact: "It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the State." Citing *Daggett v. Colgan*, 92 Cal. 56, 28 Pac. Rep. 51. So here, the fact that the board is authorized and required to collect tolls and charges under the act does not make the board an instrument or agency of the State for profit, or convert it into a mere business enterprise. The act creating the board and defining its powers and duties was inspired and authorized by the Constitution itself, in the interest and for the benefit of the people, through the promotion of commerce, which is always one of the chief cares and imperative duties of all governments. But, even if it were true that, in so far as the duties of the board were those of a wharfinger, the liabilities of the State to its employees are or should be the same as that of a private corporation engaged in the same business, it does not follow that the State is or would be liable to the plaintiff, inasmuch as he was employed in a distinct branch of

the service, viz., the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of municipal corporations, in the exercise of some of which the corporation is liable for negligence, while in others it is not.

Respondent refers to *Chapman v. State*, 104 Cal. 690, 38 Pac. Rep. 457, where the State was held liable for the negligence of the board of harbor commissioners in permitting a wharf to become unsafe, and which fell, whereby a large quantity of coal placed thereon was lost, and, after correctly stating that the liability of the defendant was that of a wharfinger, — a bailee, — and that the action was substantially an action for the breach of a contract, he argues that “the relation of master and servant is a contract relation, and this action, the same as in the *Chapman Case*, is brought to recover damages for a breach of duty under the contract.” This action, however, is in tort, and not upon contract. A tort is defined to be “any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer.” Cooley, Torts, p. 2. The same author (page 19) says: “One may become liable, in an action as for tort, either, 1, by actually doing to the prejudice of another something he has no legal right to do; 2, by doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured; or, 3, by neglecting to do something which he ought to do, whereby another suffers injury.” In the *Chapman Case* the defendant’s contract of bailment was to deliver a certain quantity of coal, and the damages for a breach of that contract was the value of the coal agreed to be delivered, and the contract itself furnished at least one of the essential standards for the measurement of damages, viz., the quantity of the coal lost. Here the contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer, — a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. Nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action *ex delicto*.

Having concluded that the action is not upon contract, that it did not arise out of the employment of the plaintiff by the

board while it was engaged in the exercise of a mere business function, but in the exercise of a governmental power for the benefit of the public, and that the act of 1893 authorizing suits against the State is merely remedial, and did not create a liability where none existed before, this action is brought clearly within the case of *Bourn v. Hart*, 93 Cal. 321, 28 Pac. Rep. 951. There the petitioner asked this court for a writ of mandate compelling the board to allow his claim against the State, in accordance with the provisions of an act of the Legislature appropriating \$10,000 for his relief, for injuries received by him while acting as a guard at the State prison, through the alleged negligence of his superior officer. The writ was denied, the court saying: "In entering the service of the State the petitioner assumed all the risks attending such employment, whether arising from its ordinary perils, or resulting from the negligence or misfeasance of other servants of the State, and the appropriation made by this act is a mere gratuity, as the State was under no legal liability to compensate him for any loss which he may have sustained while thus in the discharge of his duties."

In this discussion we have assumed, without deciding, that the evidence was sufficient to sustain the charge of negligence on the part of the officers and agents of the State, and our conclusion renders it unnecessary to consider numerous alleged errors of law occurring upon the trial. The judgment and order are reversed, with directions to the court below to sustain the demurrer to the complaint.

HECKLE V. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, February, 1899.

RAILROADS — DEATH AT CROSSING — DECLARATIONS — *RES GESTÆ*. — In an action for damages for causing the death of a person at a crossing that was out of repair it appeared that he was caught under a wheel of a car of a train, and while held there firmly by the weight of the car he made declarations to a witness on the trial as to the cause of the accident. *Held*, that the declarations were admissible as part of the *res gestæ* (1).

1. In *BARRETT v. NEW YORK CENTRAL & H. R. R. Co.* (*Court of Appeals, New York, January, 1899*), 52 N. E. Rep. 659, an action to recover damages for injuries received through being pushed from a freight train on which plaintiff was riding without right, it was held that the defendant might show a conversation between plaintiff and a third person concerning

INSTRUCTION — EVIDENCE. — An instruction that the plaintiff must establish that " the defendant had no knowledge " that the crossing was out of repair, " and that such absence of knowledge, if any, was not due to defendant's neglect in the matter of examining the crossing " was error.

SAME. — Plaintiff was not required by a preponderance of evidence to prove that deceased was free from contributory negligence.

DEPARTMENT 2. From an order of Superior Court, City and County of San Francisco, granting plaintiff's motion for a new trial, defendant appeals.

J. C. CAMPBELL, for appellant.

DELMAS & SHORTRIDGE, for respondent.

The facts and points decided are stated in the syllabus.

Order affirmed.

Opinion by MCFARLAND, J

CLARK V. BENNETT (AS RECEIVER).

Supreme Court, California, January, 1899.

STREET CAR — COLLISION WITH VEHICLE CROSSING TRACK. —

Where the plaintiff testified that just before he drove his wagon across the defendant's track he looked and listened but failed to see an approaching car until he was almost on the track and the car was then about fifty yards away and that he could have crossed the track before the car reached him if those in charge to whom he called and after they saw him had lessened its speed as they could have done, the question of contributory negligence was for the jury, though owing to obstructions, he could not see up the track nor those on the car see him until he reached the street from an adjoining lot.

SAME. — Where the evidence showed that the car was traveling faster than the prescribed limit and that those in charge after they discovered plaintiff on the track could with ordinary diligence have stopped the car before it reached him and the latter testified that the car was fifty yards away when those in charge first saw him on the track, the question of defendant's negligence was for the jury.

INSTRUCTION. — An instruction that a street railroad has only an equal right with the traveling public to the use of the street whereon its track is built though broad, was not improper from the immaterial defect in this case of omitting some few exceptions.

DEPARTMENT 2. Appeal from judgment, Superior Court, City and County of San Francisco, in favor of plaintiff.

the circumstances and cause of the accident, including a statement of plaintiff in such conversation as to his object in taking the ride and also his declaration as to whether he was pushed off the train by the conductor or brakeman.

REDDY, CAMPBELL & METSON, for appellant.

SULLIVAN & SULLIVAN, for respondent.

McFARLAND, J. — While plaintiff was driving a wagon across the railroad track of the defendant he was struck by a car and severely injured, and he brings this action to recover damages for personal injuries occasioned by the collision. The verdict and judgment were for plaintiff, and from the judgment, and from an order denying a new trial, the defendant appeals. The place where the injury occurred is within the city and county of San Francisco, and the road in question is a street railroad operated by electricity. Appellant's main contentions for a reversal are, 1, that respondent was guilty of contributory negligence which should have prevented his recovery; 2, that there was not sufficient evidence to show that there was negligence at the time of the accident on the part of the employees who were running the car which caused the injury; and, 3, that the court committed errors prejudicial to appellant in giving and refusing instructions to the jury.

1. We cannot say that as a matter of law the respondent was guilty of contributory negligence; that is, that "all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt." *Bailey v. Railway Co.*, 110 Cal. 328, 42 Pac. Rep. 914. The railroad track was on a public street called the "San José Road," and ran easterly and westerly. At the place of the accident there are some vegetable gardens on the south line of the road. The gardens are fenced, and there is a gate in the fence, through which people travel in going from the public street into the gardens, and in coming from the gardens out into the street. The railroad track lies on the southerly side of the street, and is about fifteen feet from the fence and gate. From the gate to the southerly rail of the track there is an up grade of four or five feet, and a road is made from the gate to the railroad track by a fill which is somewhat narrow. The portion of the street which is on the southerly side of the track is uneven, and cannot be traveled over with vehicles; and, in order to get from the vegetable gardens to the traveled part of the street, the railroad track has to be crossed upon the filled-in, narrow road above mentioned. This way from the railroad track into the gardens is not a public road, but it was frequently traveled by the owners of the gardens and others having business with them. The respondent was in the habit of traveling this way nearly every day. At the time of the accident the respondent drove his wagon up over this filled way onto the railroad track, and while on the track was struck by the car; and it is contended by appellant that he was guilty of contributory negligence, because he drove upon the

track without due caution. We cannot say, however, that this was so as a matter of law. He testified that when coming out of the gardens he got off his wagon and opened the gate, and then looked up the track, and could neither hear nor see an approaching car; that, in coming towards the track with his wagon, he did not see an approaching car until he was nearly or about on the track; that the car was then about fifty yards away, and that he believed he could cross the track before the car reached him; that he could have done so, if those in charge of the car, after he had hollered to them and after they had seen him, had lessened the speed of the car, as they could and should have done. It is true that before the respondent drove out of the gate, owing to obstruction of view by buildings, trees, etc., he could not see up the track, and those on the car could not see him until he came upon the road; still, he did look up the road when he first came onto it after opening the gate, and we cannot say that the jury were bound to find that his subsequent acts constituted contributory negligence. The case is certainly somewhat different from one involving the approach of a heavy train and locomotive of a steam railway passing through the country at a high rate of speed, and at long intervals, as in *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. Rep. 651. See *Driscoll v. Railway Co.*, 97 Cal. 566, 32 Pac. Rep. 591. It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city, where there is practically always an approaching car; and in such case, as street cars go at a comparatively slow rate of speed, and are quickly stopped, the question of negligence would depend upon the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment; it is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise.

2. Neither can we hold that there was not sufficient evidence to justify the jury in finding that the employees on the car were guilty of negligence. There was certainly some evidence to the point that the car was traveling faster than the prescribed limit, — eight miles an hour. And there was evidence tending to show that those in charge of the car, after they discovered the position of the respondent, could, with ordinary diligence, have stopped the car before it reached the crossing. The evidence as to the distance of the car from the crossing at the time the respondent was discovered by the

employees on the car was somewhat conflicting; but the respondent testified that the distance was fifty yards, and we cannot say that the whole evidence on that point did not warrant the jury in finding that with reasonable diligence the car might have been prevented from striking the respondent.

3. We see no good reason for reversing the judgment on account of any alleged prejudicial errors of the court in the matter of instructing the jury. Appellant's principal contentions on this subject are that the court erred in giving instruction No. 9 asked by respondent, and in refusing to give proposed instruction No. 2 asked by appellant; and that for these errors the judgment should be reversed. The attack on No. 9 is directed against its second clause, which is as follows: "A street railroad has only an equal right with the traveling public to the use of the street whereon its track is built." The court might properly have added to this the exceptions referred to in *Shea v. Railroad Co.*, 44 Cal. 414, and in *Bailey v. Railway Co.*, 110 Cal. 320, 42 Pac. Rep. 914. In the *Shea* Case the court say: "The company, however, as we understand the law, has only an equal right with the traveling public to the use of the street, with some few exceptions, not material to the question, which arise entirely from the fact that the cars are designed to run only on the railroad track, — such as that, when an ordinary vehicle meets a car on its track, it must give way to the car." The *Bailey* Case is not seriously in conflict with the *Shea* Case. In the *Bailey* Case the court below had granted a nonsuit, and this court held that the nonsuit was properly granted, because the plaintiff was guilty of contributory negligence; and the commissioner who wrote the opinion, in discussing generally the whole question of negligence as applicable to a case where there has been a collision between a street-railroad car and an ordinary traveler on foot or in a vehicle, used general language as follows: "The street car has, and from the necessities of the case must have, a right of way upon that portion of the street upon which alone it can travel, and which it cannot leave, paramount to that of persons in ordinary vehicles;" but he immediately adds "that this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of its cars. In other words, the better right is not an exclusive right, and can only be enforced against those who needlessly impose obstacles to its free and unrestricted exercise," — citing the *Shea* Case, among others. And further on he says that this principle is founded upon two reasons: "1. That the car cannot turn out or leave the track, while the vehicle or passenger can;

2, these companies are chartered, nominally, at least, for the convenience of the public." There was no question in that case about instructions to the jury, and the main significance of what was there said was that the railroad cars had a superior right of way over that portion of the street on which the track was laid, as against travelers on foot or in vehicles, and that, as the latter could easily go elsewhere on the street, they had no right to obstruct the passage of the car by needlessly remaining on the track. But, as a traveler has the right to cross the track if he does so with proper care, we do not see how the proposition stated in the opinion in the Bailey Case is material in determining the quantum of care or negligence exhibited either by the traveler or the manager of the car, in a case of collision. Therefore, even admitting that the instruction complained of should not have been quite so broad, yet we do not see that its defect in this respect was material in this particular case, or important enough to warrant a reversal of the judgment.

The proposed instruction No. 2 asked by appellant and refused by the court is as follows: "A person about to cross a street-railroad track is obliged to use due care to keep out of the way of moving cars. On approaching a track he is bound to look for approaching cars, and, if his sight be obstructed by any objects, to listen or take other satisfactory means to assure himself that no car is approaching that will injure him. The failure to take such precautions is negligence." The alleged propriety of this instruction is based principally upon language used in the opinion in the case of *Everett v. Railway Co.*, 115 Cal. 106, 43 Pac. Rep. 207, and 46 Pac. Rep. 889. That case also came here upon an exception to a denial of the court below of a motion for a nonsuit, and no question was presented touching the giving or refusal of instructions. Conceding that in the case at bar the instruction refused might have been properly given, yet we do not think that its refusal warrants the reversal of the judgment, because in other instructions given by the court the principle contained in the refused instruction was sufficiently stated. The court, among other instructions asked by appellant, gave the following: "If the plaintiff approached and attempted to cross the track of the railway operated by the defendant without exercising due care in ascertaining if any car was approaching which might injure him, your verdict should be for the defendant, unless you find from the evidence," etc. (the rest of the instruction is upon another subject). Also: "If, when plaintiff first saw the approaching car, it became apparent to him, or should have been apparent to him (after it became apparent), that a collision between the car operated by defendant and plaintiff's wagon (if it did so become apparent) was

inevitable, if he attempted to cross the track, then the plaintiff was bound to exercise prudence to prevent injury to himself, if possible; and if he was negligent in this respect, and such negligence contributed directly to the injury, your verdict should be for the defendant." There were other instructions touching this point also given at the request of appellant. In its charge to the jury, of its own motion, the court, among other things, said: "It is the duty of the railroad company to endeavor to avoid injuring a party traversing the street. It is the duty of the party traversing the street to look out for himself, and to exercise ordinary care for his own protection. To authorize a recovery by plaintiff, it must appear that he exercised ordinary care to avoid the injury complained of; that is, that he acted with ordinary prudence under the circumstances." Considering these instructions, and that all the instructions given, as a whole, stated the law correctly, and fairly to both sides, we do not think that the refusal to use the precise language contained in the offered instruction refused could have prejudiced the rights of the appellant.

Appellant contends that the verdict was against law, because it was contrary to some of the instructions given, and particularly that it was inconsistent with the instruction No. 7 given at the request of appellant; but this contention cannot be maintained. The instruction No. 7, as well as the other instructions alluded to, left open questions of fact which could be decided either way without a violation of the instructions.

There are no other points necessary to be specially noticed. It may be said of the case that the evidence left it very doubtful whether the plaintiff was not guilty of contributory negligence, and whether the employees of the appellant were guilty of negligence; but it is also true that the evidence was such as to leave those questions within the province of the jury.

The judgment and order appealed from are affirmed.

HENSHAW, J. — I concur in the judgment, and generally in the opinion; but, as to proposed instruction No. 2, I think it was properly refused as being an incorrect exposition of the law. The proposed instruction makes identical the duty of one who is about to cross the right of way of a steam railroad with that of one who is about to cross the track of a street-car line. From the nature of the business of steam railroads; from the character of the conveyances and of the motor power; from the necessity for swift transportation; from the fact that they carry the mails of the country; from the additional facts that the trains are of immense weight, that rapidity in locomotion is a high desideratum, that they cannot be

easily and readily stopped, that they move upon their own right of way, that the number of them passing a given point is comparatively few, — the rule of conduct made necessary to one who is about to cross their right of way, even upon the line of a public highway, has become crystallized into a single phrase. It is a well-recognized rule which requires the traveler, if necessary for his own protection, "to stop and look and listen," and imputes negligence to him if he does not; but this rule of the *Flemming Case*, 49 Cal. 257, of the *Glascock Case*, 73 Cal. 138, 14 Pac. Rep. 518, and of many other like cases, was by the proposed instruction sought to be extended and made applicable to one who is about to cross the track of a street railroad operating upon a public highway. The distinction between the two kinds of public vehicles is too broad, the differences between their characters too substantial, to justify their obliteration, and to impose upon the citizen occupying a highway, where his right is the same as that of the street-car company, a duty identical with that which is his when he attempts to cross the right of way of a steam-railroad company. The proposed instruction was a clear attempt to place street-railroad companies and steam-railroad companies, in this regard, upon exactly the same footing, and for this additional reason it was properly refused.

TEMPLE, J., concurred.

DENVER AND RIO GRANDE RAILROAD COMPANY v. SIPES.

Supreme Court, Colorado, January, 1899.

DEATH OF FIREMAN ON DERAILED TRAIN CAUSED BY ABSENCE OF RED LIGHT ON TRAIN ON SIDING — OPEN SWITCH — FELLOW-SERVANTS — PROXIMATE CAUSE. — Where it appeared that a long freight train, to allow an expected passenger train to pass, went upon a side track and the switch was not closed owing to the fact that the conductor and rear brakeman were asleep, and the fireman, in accordance with a rule of the road, covered the headlight on the locomotive to indicate to the approaching train that the track was clear, and the switch closed, and the passenger engine was derailed and a fireman killed, the company was not liable, as the negligence charged was that of co-servants; but where it further appeared that there was no red light in the cupola of the caboose because the lamp that belonged there had been left at the repair shop by direction of the conductor, whose duty it was to see that proper signals were provided and kept in order, and it was the custom to remove the light from the cupola when the train entered a side track, and when not removed its light was a warning of danger, and had the light been in place the

passenger train would have stopped, and the death of the fireman been averted, the proximate cause of the injury was the failure to provide the red light, and as the company delegated the duty of providing such signals to the conductor, his omission to provide it was negligence of the company, and it could not relieve itself from liability because of the contributory negligence of fellow-employees.

APPEAL from judgment, District Court, Arapahoe County, in favor of plaintiff.

This action was commenced by appellee, as plaintiff, in the court below, to recover damages resulting from the death of her husband, who was killed at night-time by the derailling of an engine upon which he was employed by appellant in the capacity of fireman, and is the second time it has been before this court for review. At the point where the accident occurred, appellant maintains a side track for the purpose of allowing trains to pass, and a freight, coming north, took this side track, and, in order to enable it to do so, the forward brakeman opened the switch at its south end, leaving it to be closed by the rear brakeman, whose duty it was to do so; but he, as well as the conductor, being asleep, it was left open. The object of the freight in taking the side track was to allow a passenger train, going south, to pass on the main one. The engine upon which deceased was employed was pulling this passenger train, and reached this point shortly after the freight had been side tracked. The fireman on the engine of the latter train had drawn a curtain over the headlight of his engine, to indicate to the engineer of the passenger train that the switch to the side track was closed and the main track clear. The rules of the company provide that the conductors of trains are responsible for the proper adjustment of switches used by them and their trainmen, except where switch tenders are stationed; and the engine of the passenger train having been derailed by the open switch, which it was the duty of the conductor of the freight to have seen was properly adjusted, the case, on the first trial, was submitted to the jury upon the theory that his negligence with regard to this switch was that of the company, but on appeal it was held by this court that such negligence was that of co-servants of deceased, and we reversed the judgment, and remanded the cause for a new trial. *Railroad Co. v. Sipes*, 23 Colo. 226, 47 Pac. Rep. 287. On the second trial, the facts with reference to the matters above mentioned are the same; but another feature regarding the negligence of the railroad company, not passed upon in the former opinion, for reasons therein stated, we are now called upon to determine from the following record of the last trial: It appears from the evidence that it was the custom of the company to carry a

red light in the cupola of the caboose of its freight trains, which was taken down when the train carrying it entered on a side track; that a light so carried displayed its rays in all directions, and is the only red light which can be seen from the front; that the cabooses were built specially for such a light, with a receptacle inclosed by red glass, in which a lamp was inserted and clasped; that no such light was being carried on this freight train the night in question, for the reason that the lamp specially constructed for this purpose was out of repair, and had been taken by the rear brakeman, by direction of the conductor of the freight, to the shops of the company to be repaired; that such light, had there been one, could have been seen by the engineer of the passenger train, and that this was the third trip made by the crew of this freight without it; that there were no other lamps in the caboose which could be used in the place in the cupola provided for such light; that two lights are carried on the rear of cabooses, so arranged as to display red to the rear, white at right angles, and green to the front; and that such lights were so carried by the freight the night of the accident.

The rules of the company, regarding signals by means of lights, so far as material, are as follows: 25. "Red signifies danger, and is a signal to stop." 34. "Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear. * * *" 74. "When a train turns out to allow another train to pass, the red lights must be removed or turned, and green displayed towards the expected train as soon as the track is clear. * * * Headlights on engines when on side tracks, or at the end of double tracks, waiting for trains, must be covered as soon as the track is clear and the train has stopped. * * *" 78. "All signals must be used strictly in accordance with the rules, and trainmen and enginemen must keep a constant lookout for them." 94. "All trains must approach * * * junction points * * * under perfect control, and will come to a full stop, unless switches or signals are seen to be right, or the track is plainly seen to be clear." 121. "In all cases of doubt or uncertainty, take the safe course, and run no risks." In regard to the duties of employees whose employment requires them to give signals, the rules provide: 23. "Conductors, * * * brakemen, * * * and all other employees whose duty may require them to give signals, must provide themselves with the proper appliances, and keep them in good order, and always ready for immediate use."

The freight train consisted of twenty-four or twenty-five cars, each about thirty feet in length. The passenger train passed the engine

of the freight at the rate of fifteen or twenty miles an hour, and was under control. The fireman, who drew the curtain over the headlight of his engine, knew that no red light was displayed in the cupola of the caboose attached to his train that night, nor did he receive any signal from which he could infer that the switch had been set to the main track. It appears from the evidence that the word "meet" is used in train service when trains coming from opposite directions meet and pass, and that the word "pass" is used where a train is overtaken from the rear by another, and the former turns out to allow the latter to go by. The cause was submitted to the jury upon the theory that, although the employees of the freight were negligent, nevertheless, if it appeared from the evidence that the company was guilty of negligence in failing to furnish the lamp for the cupola light, and such negligence was the proximate cause of the accident, the plaintiff was entitled to recover. At the request of counsel for plaintiff, the court submitted interrogatories to the jury, which were in substance: 1. Does the evidence establish that the company negligently failed to provide the cupola light for the caboose, and that such failure directly caused the accident by which Sipes lost his life? 2. Was the company, independent of its employees on the freight train, guilty of negligence which directly contributed to his death? 3. Had the company provided the cupola light, would it not absolutely have prevented the accident?

Instructions requested by counsel for defendant, and refused, were based upon the proposition that the proximate cause of the accident was the negligence of the employees of the freight train, and, if given, would, in effect, have directed the jury to return a verdict in its favor. Other instructions requested by counsel, and refused, were to the effect that whether the failure to provide a cupola light was the proximate cause of the accident or not depended upon whether any new cause intervened, between such failure and the accident, sufficient of itself to cause it, and, if such cause did so intervene, then the failure to provide the cupola light must be considered as too remote, and not the proximate cause of the accident, even though the cupola light might have prevented it; that, if there were other lights in the caboose which might have been used in place of the cupola lamp while it was being repaired, the defendant is not liable; and, although the lack of such light was the cause of the accident, defendant would not be responsible, unless the employee who left the regular lamp to be repaired asked the proper officer of the company for another to take its place, and failed to obtain one. Verdict and judgment for \$4,500, from which the defendant appeals.

WALCOTT & VAILE and HENRY F. MAY, for appellant.

THOMAS B. STUART and CHARLES A. MURRAY, for appellee.

GABBERT, J. (after stating the facts). — Counsel for appellant assign as error the giving and refusal of instructions; admitting evidence regarding the custom of carrying a red light in the cupola; submitting the special interrogatories, because leading and not based upon the evidence.

The propositions raised by appellant on the errors assigned, except that relating to the leading character of the special interrogatories submitted, are dependent for solution upon what the evidence tends to establish, or does establish, on these questions: First. What was the proximate cause of the accident? Second. Was this cause the negligence of appellant? There are also presented these legal propositions: Did the negligence of the employees of the freight train, in leaving the switch open and giving the affirmative signal that the track was clear, relieve appellant from responsibility for its negligence, if negligence upon its part was established? And should the cause, under the evidence, have been submitted to the jury? But, before proceeding with a discussion of the evidence bearing on the vital questions in the case, the rules of law by which these questions and their materiality must be determined will first be stated. When the facts are undisputed, the question whether a certain act is the proximate cause of an injury is one of law for the court (*Henry v. Railroad Co.*, 76 Mo. 288; *Pike v. Railway Co.*, 39 Fed. Rep. 255); but ordinarily the question of what was the proximate cause of an accident is a question of fact, to be determined by the jury, from the evidence, under appropriate instructions by the court (*Railroad Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. Rep. 261; *Railway Co. v. Kellogg*, 94 U. S. 469; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. Rep. 352; *Investment Co. v. Rees*, 21 Colo. 435, 42 Pac. Rep. 42). "Proximate cause" is defined as "that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred" (*Lutz v. Railroad Co.* [N. M.] 30 Pac. Rep. 912; 16 Am. & Eng. Enc. Law, 436); or "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause" (*Railroad Co. v. Budin*, 6 Colo. App. 275, 40 Pac. Rep. 503). It is the duty of an employer to make reasonable efforts to keep machinery and appliances used by his employees in suitable condition for use. This is one of the duties which he is bound to perform, and cannot be delegated, so as to exonerate him from liability to an employee who is injured by the negligence of a co-employee, charged with

the performance of such duty, in failing to do so; for the employee so charged is the representative of the employer, and not a co-servant with the one who sustains an injury by the negligent performance of such duty, and the act or omission of the employee in this respect is that of the employer, irrespective of the grade of the employee whose negligence caused the injury. *Wells v. Coe*, 9 Colo. 159, 11 Pac. Rep. 50; *McKinney*, Fel. Serv., sec. 32; *Brann v. Railroad Co.*, 53 Iowa, 595, 6 N. W. Rep. 5; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Corcoran v. Holbrooke*, 59 N. Y. 517; *Fuller v. Jewett*, 80 N. Y. 47. If the negligence of the master is the proximate cause of an injury to an employee, he is not relieved from responsibility because the negligence of a co-employee contributed to such injury. *McKinney*, Fel. Serv., sec. 31; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Town v. Railroad Co. (Mich.)*, 47 N. W. Rep. 665; *Cone v. Railroad Co.*, 81 N. Y. 206; *Cayzer v. Taylor*, 10 Gray, 274; *Thomp. Neg.*, p. 981, note 10.

The engine upon which deceased was employed was derailed by the open switch, which was left in that condition by the neglect of the employees on the freight train. The affirmative signal given by the fireman on the engine of the freight, that the track was clear, was also negligence. But all these acts were those of co-employees of deceased, and, as held in the previous decision of the case by this court, for such negligence the company is not responsible; and it therefore becomes necessary to inquire whether or not the evidence discloses any negligence on the part of appellant which directly contributed to the result which followed the negligent acts of the employees of the freight train. The claim of appellee is that the absence of the cupola light was due to the negligence of appellant, and that its presence would have prevented the accident.

The rules require that two or more red lights shall be carried on the rear of each freight train after sunset; that, when a freight is side-tracked for the purpose of allowing another to pass on the main track, these lights must be turned or removed, and green displayed toward the expected train as soon as the track is clear, *i. e.*, the switch reset. In order to comply with this rule as a signal to a train approaching from the rear, the tail lights would be turned so as to display green towards the expected train, and, if a red light was carried in the cupola, it would be necessary to remove that before the engineer of the approaching train would understand that the track was clear; for with a red light displayed in the cupola, although the tail lights displayed green, he would be warned that something was wrong, because the signals were not right, and red, signifying danger, would signal him to stop. The employees of a train

approaching from the front could not see the red tail lights, but could see one in the cupola. They would also see the green displayed by the inside tail light, which, alone, would indicate that the track to the rear was safe. But with the red from the cupola they would understand that something was wrong, because, under the rules, that light would be removed if the switch had been properly adjusted, and, being a signal of danger, would mean "Stop." So that, in order to comply with the rules, and carry red lights, by means of which approaching trains, attempting to pass another upon a side track, either from the rear or front, would be signaled, this becomes the most important red light upon the train; for it serves two purposes when a train has turned out to permit another to pass from the front to the rear: First, upon being taken down it is a signal to the employees of the train upon the side track to cover the headlight on the engine of such train; and, second, if an employee should negligently, as in this case, cover such headlight without being signaled that the switch was closed, such negligence would not result in an accident to an approaching train, for the reason that the engineer of such train would see the cupola light, and bring his train to a stop; and though there may be, in railway usage, a distinction or difference in the use of the words "meet" and "pass," as applied to a train passing another from the front to the rear, or in the opposite direction, we cannot agree with the contention of counsel that the rules regarding signals are susceptible of a construction which recognizes that difference. To do so would be to inject an ambiguity which does not now exist, create confusion where there is now an harmonious whole, and make an exception to the rule that red signifies danger, when no such exception is given; because rule 74, when read in connection with the others and the evidence relating to the manner lights upon a train are displayed, and how they are used as signals, is perfectly clear, and, if followed, will prevent accidents of the kind which happened to the passenger train in this case, whether such train is attempting to pass one upon a side track, either from the front or rear, and is a prudent provision, by which those nearest the point of danger will, by their affirmative act, indicate to the approaching train that all is right. And while it is true, as contended by counsel for appellant, that the latter part of this rule directs that the headlight of an engine, waiting for a train to pass from the front, must be covered as an affirmative signal to the approaching train, we find nothing in this or other rules which makes the distinction based upon the direction a train is moving, which one upon a side track is waiting to let pass, as contended for by counsel for appellant; because nowhere in the rule is

the word "meet" used, but only the word "pass," and, attaching to the words employed their ordinary English significance, we find that the rule provides specifically what particular signals shall be given by a train waiting for another to pass, as determined by the direction from which such train will approach, and the evidence clearly justified the jury in finding that, had a red light been displayed from the cupola of the freight train on the night in question, the accident to the engine of the passenger train would not have occurred, because its presence would have at once warned the engineer of that train of the condition of the switch, and his train being under control, with a distance of not less than between 700 and 800 feet to run, and probably much more, after he passed the engine of the freight, before reaching the open switch, there was no evidence which rendered the result, if the light had been up, at all problematical.

It is contended by appellant that the rules do not provide for a red light in the cupola of a caboose. Literally, this is true. Nor do they designate where any of the red lights on the train shall be carried, except on the rear; but they provide for two or more. The cabooses were constructed with the view of carrying a red light in the cupola, and admitting evidence that it was the custom to carry one, so displayed, at night, was but evidence of the fact that the company, in compliance with the rules on the subject, carried this third light in a certain way, and which, in fact, was necessary to be so carried, in order that the rules regarding the giving of signals by means of lights might be fully complied with. For the purpose of displaying this light, a particular kind of lamp was required, and one was specially constructed for this purpose. This was one of the appliances which the company was bound to furnish for use upon its freight trains. It delegated this duty to the employees using such light. They were required to keep it in good order, and ready for use; and their failure to do so, or ask for or obtain another, during the time the regular one was being repaired, was the act of appellant, in so far as other employees might be affected by such neglect. So that the evidence on this subject was ample to warrant the jury in finding that the omission of the employees charged with this duty was the omission of their principal in this respect, and negligence upon its part in so failing to equip this freight train with that necessary appliance for its safe operation; and, under the evidence and the findings of the jury on the two main questions in the case, we must answer in the affirmative the very pertinent question propounded by counsel for appellant in oral argument: Is the presence or absence of a red light in the cupola of a caboose, standing upon a side track, a signal to a meeting or passing train?

It is claimed that the instruction requested by appellant, to the effect that if there were other lights or lanterns in the caboose, which might have been used in place of the cupola light while it was being repaired, then the defendant cannot be held liable in this action, should have been given. Had there been a lamp in the caboose which could have been used in the place provided for the cupola light, possibly this instruction should have been given. But we will not pass upon that question, because there is no evidence upon which to base it; and, although there was a red lantern which might have been fastened to the outside of the cupola, there is no rule requiring employees, in the absence of the regular cupola lamp, to do so, and their failure to take this precaution, under such circumstances, will not relieve their principal from responsibility for failure to supply the usual and specific lamp for a particular purpose and place. Had it not been for the open switch, no accident would have occurred to the engine of the passenger train on account of the absence of the red light from the cupola of the caboose. But, if the light had been present, the jury found, the accident could not have happened, so that the absence of this light was the prime factor in causing the engine to be derailed; and, because the employees of the freight were guilty of acts of negligence which contributed to the accident, the appellant is not relieved from the result of its own, where, as in this case, notwithstanding the negligence of the freight crew, no accident would have occurred had it not been also guilty of negligence upon its part.

The only remaining question to consider is that based upon the exception of appellant to the special interrogatories propounded to the jury, the objection being that they were so framed and worded as to indicate to them just what answer was required. Special questions submitted to a jury should be carefully drawn, and call for a direct answer, and, although they might be leading if propounded to a witness, that is not an objectionable feature when propounded to a jury; for they are disinterested, and would not be controlled in their answer for the same reason that a witness might if asked a leading question. Besides, the questions propounded here relate to the very issues upon which the case turned, and called for an answer, either "Yes" or "No," and that they were so framed that none other could be given is not objectionable; nor do we think that either of these questions was so worded that it indicated that a certain answer was desired. The case was fairly and intelligently submitted to the jury; the evidence fully sustains the findings on the issues presented; and the judgment of the District Court is therefore affirmed.

Affirmed.

WILLSON V. BOISE CITY.

Supreme Court, Idaho, January, 1899.

MUNICIPAL CORPORATIONS — DIVERGENCE OF WATER COURSE —

LANDS OVERFLOWED. — 1. The waters of a natural stream flowed through the city, crossing ten streets therein, and during high water flooded the streets, injuring them, to the damage of the city. To avoid such injury, the city constructed an artificial canal, and diverted the waters of said stream therein. The canal was not of size sufficient to convey the waters of said stream, and overflowed, and injured plaintiff's lands. *Held*, that the city was liable to plaintiff in damages, it being beneficially interested in the change of the course of a natural stream, and negligent in not constructing the canal of size sufficient to carry the waters of said stream at all times, and in quantities that might be reasonably anticipated.

2. A grant of power carries with it authority to do those things necessary to the exercise of the power granted.
3. One who purchases land, and improves the same, on the line of an artificial water way constructed by a municipal corporation, may well rely upon such municipal corporation to perform the duty that it is under of keeping such artificial water way in repair and condition to carry all of the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his lands by waters from such artificial water way.

(Syllabus by the court.)

APPEAL from judgment, District Court, Ada County, in favor of plaintiff for \$500 and costs of action.

C. C. CAVANAH, for appellant.

HAWLEY & PUCKETT, for respondents.

The facts and points decided are stated in the syllabus.

Judgment affirmed.

Opinion by QUARLES, J.

MCPEEK V. WESTERN UNION TELEGRAPH COMPANY.

Supreme Court, Iowa, January, 1899.

EVIDENCE — PROCLAMATION OF GOVERNOR. — A copy of a proclamation of the governor offering a reward for the arrest of a person, certified by the secretary of state to be a record on file in his office was properly admitted in evidence in lieu of the original.

EVIDENCE. — Evidence of an arrangement between plaintiff and a person who was to send him a telegram when an accused person was in a position to be captured was admissible in an action for damages for delay in delivering the telegram that was sent.

EVIDENCE OF IMPORTANCE OF TELEGRAPHIC MESSAGE. — Extrinsic evidence was admissible to show that the defendant had notice of the importance of the message.

DELAY IN DELIVERY OF TELEGRAM — LOSS OF REWARD THEREBY — DAMAGES. — Where, because of a delay in the delivery of a telegram, plaintiff alleged as damages sustained the loss of a reward of the governor for the capture of a criminal, and it appeared that the company had no actual notice of the reward and the plaintiff did not know that it had been offered, though he understood it would be, and the agent at the point of destination of the telegram knew that plaintiff was expecting a telegram relating to the capture of the criminal and that prompt delivery was required, the damages were not too remote (1).

1. *The following are some recent cases arising from Delay in Delivery of Telegrams:*

In **BREWSTER v. WESTERN UNION TEL. CO.** (*Supreme Court, Arkansas, October, 1898*), 47 S. W. Rep. 560, it was held that where members of a firm telegraphed another member who was their buyer to close an option that he held to purchase cattle at a certain price, and the message was delayed in its delivery until after the option expired, the damage sustained was the difference between the contract price and the market price at the place of purchase on the day on which the option expired, and the fact that there was a rise in the market value of cattle some days thereafter by which, if the purchase had been made at the contract price, a profit would have been secured, had no bearing on the damages.

In **HENDERSHOTT v. WESTERN UNION TEL. CO.** (*Supreme Court, Iowa, October, 1898*), 76 N. W. Rep. 828, a telegraphic message reading "Bravo is sick; come and fetch Miller at once," was sent to plaintiff. There was a delay of about five hours in its delivery. Bravo was a valuable horse of plaintiff, at a training stable about twelve miles from plaintiff's home. Miller was a veteri-

nary surgeon. The evidence showed that the horse was taken sick about seven A. M.; that if Miller had reached the horse five or six hours earlier, his chances for recovery would have been greater; and that in all reasonable probability the horse would have been saved, had it been treated five or six hours earlier. *Held*, sufficient to sustain a finding that the delay in the delivery of the message was the proximate cause of the death of the horse, and the message itself was sufficient notice to the company of the damages that might result from a prompt delivery.

In **CARLAND v. WESTERN UNION TEL. CO.** (*Supreme Court, Michigan, October, 1898*), 76 N. W. Rep. 762, plaintiff's action was brought to recover damages from the defendant for its failure to promptly transmit and deliver a telegram, whereby the plaintiff is said to have suffered a loss. The plaintiff, a merchant, residing at Corunna, called the office of the defendant at that place by telephone. Mr. Young, defendant's agent, responded, whereupon the plaintiff asked him to take a message, which he did. The message was as follows, viz: "Corunna, Mich., Jan. 25, 1898. To G. W. Wylie Company, 145 Van Buren Street, Chicago, Ill.

SAME. — Whether the plaintiff would have made the arrest if the message had been delivered was for the jury, and it was no defense to the action that if the message had been delivered the arrest could not have been made because the train did not reach the place where the criminal was located in time, where it was shown that plaintiff could have reached the place by private conveyance.

DELIVERY OF MESSAGE OUTSIDE OFFICE HOURS — SCOPE OF EMPLOYMENT. — The company having undertaken to deliver the message outside office hours was bound to do so with reasonable diligence and the agent who received it to do so was acting within the scope of his agency.

APPEAL from judgment, District Court, Henry County, in favor of plaintiff.

BLAKE & BLAKE, for appellant.

JOHN D. DILL and **W. I. BABB**, for appellee.

Buy three May. John E. Carland." It was intended to be understood to mean, "Buy three thousand bushels of May wheat." After waiting twenty-four hours without response to his message, the plaintiff called the defendant's office by telephone, and was answered by Mr. Reed, Young's assistant, who, in response to his inquiry, assured him that the message was sent. Twenty-four hours later the plaintiff called upon Young, who said he would trace the message, and he reported later that the message was never received at the Chicago office, and a duplicate of the message was sent on January 28th. The testimony tended to prove further that the price of wheat advanced meantime, and plaintiff's agent was obliged to pay a higher price than would have been necessary had the first message been sent promptly. A verdict was rendered in favor of the plaintiff. The court held that the operator of the telegraph company was its agent in receiving over the telephone the message to be transmitted in the absence of evidence that the company forbade the practice or if it was forbidden that the sender had notice of the regulation. Also that the statement of the operator made two days after the message should have been sent that it had

not been received at the office to which it was sent was competent to show non-delivery of the telegram.

In *JACOBS v. POSTAL TELEGRAPH-CABLE CO.* (*Supreme Court, Mississippi, December, 1898*), 24 Southern Rep. 535, it was held that a delay in the delivery to plaintiff of a telegram that read, "Wait; I mail letter this day with full particulars," whereby he lost a situation, will entitle him to the statutory penalty of twenty-five dollars, but not to special damages.

In *WESTERN UNION TEL. CO. v. COOK* (*Supreme Court, Nebraska, March, 1898*), 74 N. W. Rep. 395, where it appeared that the plaintiff was a real estate broker and had for sale a piece of property that a customer purposed buying but the terms did not suit him, and after he left for his distant home, the plaintiff wired him the terms required by the owner, which were the same as those the customer had already objected to, but the message when delivered stated more onerous terms and the sale was not consummated, the telegraph company was held liable for the commissions of the broker.

In *WESTERN UNION TEL. CO. v. BEALS* (*Supreme Court, Nebraska, October, 1898*), 76 N. W. Rep. 903, a message was delivered to a telegraph

LADD, J. — September 20, 1896, after mortally wounding John Finley, the marshal of Morning Sun, Orman McPherson, fled. A few days later the plaintiff saw his wife, who promised to assist him in procuring the arrest of her husband. McPeck obtained McPherson's pension papers from Keithsburg, Ill., for her, and she advised him (being in secret correspondence under an assumed name) of having these, and he came to her room at the hotel at Morning Sun, where she was employed as cook, October 22, 1896, at about ten o'clock P. M. (having so arranged earlier in the evening), and there remained until between three and four o'clock the following morning. Before coming in, he gave up his revolvers, and she placed them in a bureau, where they remained during his stay. She had agreed to write to McPeck when she expected her

company which read, "Attach property of A. for seven hundred ninety dollars." The message as delivered read, "even hundred ninety dollars." Held, that the recipient of the message was not guilty of negligence in interpreting the amount \$190, and the company was liable for the loss of the balance.

In *CASSION v. WESTERN UNION TEL. CO.* (*Supreme Court, North Carolina, November, 1898*), 31 S. E. Rep. 493, it was held that mental anguish suffered by the plaintiff because of the nonarrival of a brother-in-law in consequence of negligent delivery of a telegram announcing the death of the sender's, the plaintiff's husband, must be affirmatively proved in order to recover; it will not be presumed as in the case of husband or wife or a near blood relative.

In *JONES v. WESTERN UNION TEL. CO.* (*Supreme Court, Tennessee, November, 1898*), 47 S. W. Rep. 699, it was held error for the trial court to charge that the defendant was under legal obligation to exercise only such diligence in the delivery of the telegram "as an ordinary, prudent and diligent man would exercise in the discharge of his own business under like circumstances."

In *WESTERN UNION TEL. CO. v. TRICE* (*Texas Civil Appeals, December, 1898*),

48 S. W. Rep. 770, it was held that an award of one thousand dollars as damages for mental suffering from failure to deliver a telegram thereby depriving a sister of the opportunity to see her brother before his death was not excessive, there being evidence that she entertained a warm sisterly affection for him.

In *WESTERN UNION TEL. CO. v. WALLER* (*Texas Civil Appeals October, 1898*), 47 S. W. Rep. 396, it was held that a message which read, "Your child is very low. Come at once," was sufficient to put the telegraph company on notice that the child might die at any moment, called for prompt delivery, and was a basis for damages for a failure of the addressee to arrive in time for the funeral, although there was no statement that the child was dead.

In *WESTERN UNION TEL. CO. v. SWEETMAN* (*Texas Civil Appeals, October, 1898*), 47 S. W. Rep. 676, it was held that a telegraph company was charged with notice of the relationship between the addressee and a sick person concerning whom the telegram was sent, whether such relationship was disclosed in the telegram or not; and that the addressee had a serious interest in its prompt delivery though he had no contract with the company.

husband, but, if he came unexpectedly, then to telegraph him. At about seven o'clock P. M. of the 22d, she delivered to the defendant's agent at Morning Sun this telegram: "E. E. McPeck, Winfield: Come on first train. Answer. M. E. M.;" telling him she wanted it "sent right away and delivered, and wanted an answer." Ridgeway, the agent at Winfield, usually closed his office at six o'clock, but was ordinarily at the station at about nine o'clock. He received the message at 9:15 o'clock P. M., and carried it to the plaintiff's house, reaching there at about 9:30. After repeatedly rapping on the door, and being unable to arouse anyone, as he says, he placed the message over the door knob, with the end of the envelope between the door and the jamb, where it was found the next day at between nine and ten o'clock A. M. It seems, the agent supposed the family was away from home, and would find it upon their return. They had in fact retired, and all testify that they did not hear the rapping of Ridgeway, or any noise at the door, and that they would have heard it, had there been any. The only train, carrying passengers, leaving Winfield for Morning Sun, a distance of about twelve miles, left the former place at six o'clock A. M. McPeck had told Ridgeway he was making an effort to capture McPherson, and might get a telegram from Morning Sun concerning the matter, and that if a message came, and he was unable to find him, to deliver it to Siberts, a constable. Both had repeatedly called at the office for such a telegram. It also appears that Siberts, by direction of McPeck, had arranged for a team at the livery stable and a driver to be ready for him at any time, and that Siberts was to go with McPeck in case McPherson should come to Morning Sun. The constable at the latter place, and another, had agreed to assist him, though not advised as to the nature of the business, except that it was to make an arrest. The evidence was such that the jury was warranted in finding the facts as stated, though it must be added that Ridgeway denies having previously talked with either the plaintiff or Siberts; and McPherson, who was afterwards arrested, declared he was not at Morning Sun as testified by his wife, and did not correspond with her. On the 21st day of October, 1896, the governor of Iowa, by proclamation, offered a reward of \$300 for the arrest of McPherson, and his delivery to the proper authorities. The plaintiff's action is based on the allegation that he lost this reward through the negligence of the defendant in not delivering the message on the evening of October 22d. With these preliminary statements, we shall be able to consider the different questions presented by the record.

1. A copy of the governor's proclamation, duly certified by the secretary of state, was received in evidence over the objection of

defendant. That such a reward was authorized by section 58 of the Code of 1873 is not questioned. The method of making the offer is not pointed out, but it is to be paid upon the certificate of the governor. Usage has approved offering such rewards by way of proclamations, and this fully complies with the statute. That original proclamations made by the executive of a State should be preserved, admits of no doubt. The statutes make no express provision for such preservation, but by section 66 the secretary of state "shall have charge and keep * * * papers which are now or may be hereafter deposited to be kept in his office." The secretary certified that he was the custodian of the record of the official acts of the executive department, and that the proclamation was a part of the files of his office. We take it, then, that this was deposited, to be kept by the secretary of state. Section 4649 provides, in substance, that acts of the executive of this State are proved by the records of the State department. The very evident purpose is to avoid the necessity of calling the governor before a co-ordinate branch of government to give evidence or answer for any of his acts. While the statute does not in express terms make such papers a part of the files to be kept and preserved by the secretary of state, we are of opinion that section 66 is broad enough to include them, that by fair implication section 4649 authorizes them to be so kept, and that, under sections 4649 and 4635 of the Code, a certified copy thereof is admissible in evidence in lieu of the originals.

2. The defendant also interposed objections to the testimony of the plaintiff, Siberts, and Mrs. McPherson to the arrangement made between them with reference to the capture of McPherson. This was original, and not hearsay, evidence. It related to circumstances and facts essential to be proven as leading up to the sending of the telegram, and had a direct bearing upon the probability of the plaintiff effecting the arrest of McPherson, had the telegram been promptly delivered. It was necessary to show the exact situation, and all that had been done to accomplish that purpose. The appellant is impressed by the danger of fraud in this class of evidence. It is suggested that, if there be possibility of fraud, it may readily be obviated by the exercise of diligence.

3. It is insisted that the damages were remote, and not such as either party might have contemplated from the wording of the message. But extrinsic evidence was admissible to show that defendant had notice of the importance of the message. *Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. Rep. 583; *Telegraph Co. v. Edsall*, 74 Tex. 329, 12 S. W. Rep. 41. The appellant argues the case on the theory that the action of plaintiff is for the breach of contract. He made

no contract with the defendant. This is conceded by appellant in its opening argument, and denied in its reply. The first impression was undoubtedly the correct one. The contract was with the sender of the message, and whether recovery might be had for breach thereof, because made for plaintiff's benefit, we need not determine. This action is based on the negligence of the defendant in the performance of a duty in its public capacity as a common carrier of messages. In all such actions, sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force." *Mentzer v. Telegraph Co.*, 93 Iowa, 757, 62 N. W. Rep. 1; Code, sec. 2163; *Telegraph Co. v. Du Bois*, 128 Ill. 248, 21 N. E. Rep. 4; *Telegraph Co. v. Allen*, 66 Miss. 549, 6 Southern Rep. 461; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Telegraph Co. v. Fenton*, 52 Ind. 1; *Smith v. Telegraph Co.*, 83 Ky. 104; *Miliken v. Telegraph Co.*, 110 N. Y. 403, 18 N. E. Rep. 251; *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. Rep. 1044; *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857. There was evidence tending to show that immediate delivery was requested, and that the agent at Winfield knew that McPeck was expecting a message, that it would relate to the capture of McPherson, and that prompt delivery was required. If so, while he may not have known of the reward being offered, he may well be credited with understanding that McPeck was putting forth his efforts to accomplish a purpose from which he anticipated some benefit to accrue to himself. The law authorizes the offering of such rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may reasonably be anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made, and it might reasonably reckon on such a contingency, in omitting its duty with reference to such a message. Nor was the plaintiff advised that the reward had actually been offered on October 22d, though he understood it would be, and was acting to secure this and others proposed by local officers. That the omission of the defendant caused greater loss than he then supposed, does not affect its liability, or his right of recovery. Certainly the loss of the reward was the direct result of the failure to arrest and deliver McPherson to the proper authorities, for this was the very condition of its payment.

4. The burden was on the plaintiff to prove that in all reasonable probability the loss resulted from the negligence of the defendant.

Hendershott v. Telegraph Co. (Iowa), 76 N. W. Rep. 828 (1). Had the plaintiff proceeded by team to Morning Sun, with the assistance of the two constables and another, there seems no good reason to doubt that he would have arrested McPherson, who had been disarmed by his wife. This is not absolutely certain, for many contingencies may be supposed which could have intervened. While these might well be considered, they do not warrant us in saying that these men would not have accomplished that which has often been done before, and which is ordinarily done by officers in like situation. Whether they would in all probability have succeeded, was for the jury to determine.

5. It is suggested that, as the train did not go until 6:06 in the morning, even if the message had been delivered the plaintiff could not have reached Morning Sun in time to make the arrest. But the plaintiff had made every arrangement to go by team. This message was understood by the plaintiff to require immediate attention owing to his agreement with Mrs. McPherson.

6. It may be that the defendant can fix office hours which are reasonable, and that those from 8 A. M. to 6 o'clock P. M. are not unreasonable. This we do not decide. But see *Telegraph Co. v. Harding*, 103 Ind. 505, 3 N. E. Rep. 172; *Given v. Telegraph Co.*, 24 Fed. Rep. 119. The company received this message, if Mrs. McPherson is to be believed, with the understanding that it was to be delivered at about nine o'clock. The agent at Winfield received it, and the company, having undertaken to deliver it, was bound to do so with reasonable diligence. *Telegraph Co. v. Bruner* (Tex. Sup.) 19 S. W. Rep. 149; *Thomp. Elect.*, sec. 300. He was acting within the scope of his agency, although not within the hours fixed for the active discharge of his duties. This could not relieve the company from discharging the obligation incurred by receiving the message to be delivered out of office hours.

7. The defendant asserts that no negligence in failing to deliver the message has been shown. If the testimony of Ridgeway be accepted as true, it might be that, in loudly rapping on the door repeatedly, and receiving no response, he exercised reasonable diligence. This is in dispute. The daughter of the plaintiff testified that she was at his home from 9 o'clock P. M., and did not retire until a half hour later, and that she heard no noise at the door. Mr. and Mrs. McPeck also testified that they heard no such noise, and that they would have been likely to have heard it, had there been any. Whether Ridgeway made any effort to arouse the family is put in question by this evidence. If he was advised of the

1. See abstract of this case in notes of cases to the case at bar on page 315, *ante*.

importance of the message, as claimed by the plaintiff, he was bound to exercise diligence accordingly, and whether he did so was for the determination of the jury.

Some other matters are discussed, but they are not of sufficient importance to call for special attention. We discover no error in the record, and the judgment must be affirmed

Affirmed.

BEARD V. GUILD.

Supreme Court, Iowa, February, 1899.

PLEADING — PROOF — INSTRUCTION. — Where it was charged in the petition that the negligence consisted of driving a hack, in which plaintiff was riding, over a rough street and an endeavor to pass another team, whereby the plaintiff was thrown out, it was error to instruct the jury that if the defendant failed to furnish good horses or skilful and careful drivers he would be liable for the injuries and that it was his duty to furnish good vehicles, and to keep the same in repair.

APPEAL from judgment, District Court, Linn County, in favor of plaintiff.

RICKEL & CROCKER and WILLIAM GLENN, for appellant.

CHARLES W. KEPLER, for appellee.

DEEMER, J. — Appellant is engaged in the business of running hacks to and from the town of Mt. Vernon, to the depot of the Chicago and Northwestern Railroad Company. On the 30th day of August, 1895, plaintiff, who was carrying a young babe, took passage in one of appellant's vehicles at the railway depot, to be driven to her home, in the town of Mt. Vernon. While driving along one of the streets of that town, which had been recently macadamized with broken stone, that had been so laid as to make the center of the street from eighteen inches to two feet higher than the sides, defendant attempted to pass a team which preceded him, and, in so doing, was compelled to run his horses along the side of the street, and near to a ditch, which was partially filled with broken stone. While appellant was driving fast, in his effort to pass the team, appellee, with the babe in her arms, was thrown from the hack, and into the ditch, receiving injuries of which she complains. Appellant was so intent on getting past the team that he did not know that appellee had been thrown from his hack until he had passed the team he was endeavoring to go around, and then learned it from one of appellee's children, who remained in the vehicle. The negligence declared upon is the care'less attempt to go round the team

where the accident occurred, and the running of the team over the rough, macadamized street. The original pleading did not allege that appellee did not by her own negligence contribute to the injury. After the verdict was returned, and before a motion in arrest of judgment had been submitted, appellee, by leave of court, filed an amendment to her petition pleading freedom from contributory negligence. No motion was made to strike this amendment, and no response was made thereto by appellant.

Under the statutes existing when this case was tried (secs. 2842 and 2843 of the Code of 1873), the facts thus stated were admitted, and appellee was entitled to such judgment as she would have been entitled to had these facts been stated in the original petition. The trial court, after stating the issues and instructing that the burden was upon plaintiff to prove the material allegations of her petition, further charges as follows: "4. If you are satisfied from the said evidence that, at the time of the alleged injury of plaintiff, defendant was engaged in the business of carrying passengers for hire from the railroad depot to his hotel and other parts or places in the town of Mt. Vernon, and you further find he received plaintiff into his hack, by him used for carrying passengers, and while she was being so carried, it was incumbent upon defendant, and it was his duty, as the proprietor of said hack, to furnish good and safe horses, skilful and careful drivers, for the team, and to manage and drive the same with care, skill, and prudence, and if he fails to so do, and injury occurs to a passenger because of such failure, he would be liable therefor. 5. You are instructed that it is the duty of the proprietors of hacks kept and used for the transportation of passengers for hire to furnish good vehicles, and to keep them in good repair, and are bound to exert the utmost skill and prudence in carrying their passengers, and are responsible for the slightest negligence or want of skill but are not responsible for unavoidable accidents, beyond their control." It will be noticed that the petition does not charge failure to furnish good and safe horses, skilful and careful drivers, or good vehicles. Nor does it allege any fault in failing to keep the hack in repair. The instructions which we have quoted told the jury, however, that, if the defendant failed to furnish good horses or skilful and careful drivers, he would be liable therefor. The fifth instruction states that it was the duty of appellant to furnish good vehicles, and to keep them in repair, and that he was responsible for the slightest negligence or want of skill. As there were no such charges of negligence, it was manifestly improper to submit them to the jury. *Storrs v. Emerson*, 72 Iowa, 390, 34 N. W. Rep. 176; *Miller v. Railroad Co.*, 76 Iowa, 318, 41 N. W. Rep.

28; *Deppe v. Railroad Co.*, 36 Iowa, 52; *Roberts v. Richardson*, 39 Iowa, 290.

That the jury understood the condition of the hack to be directly in issue is manifest from the manner in which the case was tried. A witness was asked whether there was a door to the hack at the time of the injury. After stating there was not (which answer was proper enough under the issues presented), he was further asked how long after the accident it was that appellant put a door on the hack. This question was objected to, but the objection was overruled, and the witness answered that he put a door on afterwards. Defendant was also asked upon cross-examination about his having put a door on the hack after the accident, and, against the objections of his counsel, was compelled to state that he did so about six months afterwards. We can think of no other purpose in the introduction of this evidence than to show negligence in the construction of the vehicle. Both defendant and witness to whom we have referred had positively stated that there was no door to the hack at the time the accident occurred, and the evidence as to repairs was not admitted for the purpose of proving there was no door to the vehicle when plaintiff was injured. That was already proven and uncontradicted. It was for no other purpose, then, than showing a confession by defendant of his negligence in not having a door to the hack. The evidence was improperly admitted in any event. We have uniformly held, in a great variety of cases, that evidence as to repairs or changes made after an accident is incompetent and immaterial. See, also, *Thompson v. Railway Co.*, 91 Mich. 255, 51 N. W. Rep. 995; *Jennings v. Town of Albion*, 90 Wis. 22, 62 N. W. Rep. 926; *Hammargren v. City of St. Paul (Minn.)*, 69 N. W. Rep. 470.

2. Appellant was asked on cross-examination if he had ever before attempted to run around any one when he had passengers in his hack. This question was objected to, and the objection was overruled. In view of his testimony given in his examination in chief, the ruling was correct.

3. Evidence as to the general build and make-up of the hack was also received over appellant's objections. This was properly admitted, for the construction of the hack was a proper matter to be considered in determining whether appellant was negligent in the manner charged, in view of all surrounding circumstances, among which was the condition of the hack.

Some other errors are assigned relating to the admission of evidence. We have examined them with care, and find they are without merit.

For the errors pointed out, the judgment is reversed.

GIBSON v. BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

Supreme Court, Iowa, February, 1899.

EVIDENCE. — Where a witness testified that he saw the accident and was almost immediately thereafter taken to the defendant's office by one of the officials, in the absence of anything showing that the reason of his going to the office and the conversation that ensued was either relevant or competent, the evidence was properly excluded.

EVIDENCE — CUSTOM — INJURY TO FIREMAN INSPECTING ENGINE.

— Testimony of a witness that he had personal knowledge of the custom of a fireman, who was injured while inspecting his engine, and what his custom was when inspecting it, was admissible.

SAME. — Where a fireman was injured while inspecting his engine, and there was evidence showing that it was his custom to notify other employees that he was about to inspect the engine, and that he did not do so at the time of the accident, a charge that his failure to notify was contributory negligence was proper.

CHARGE — CONFLICTING INSTRUCTIONS — FIREMAN WHILE INSPECTING ENGINE KILLED BY CARS COUPLED TO REAR OF TRAIN. — Where a fireman while inspecting his engine passed his arm through one of the driving wheels in order to touch an eccentric, and while in that position some cars were coupled to the rear of the train, which caused the engine to move and the fireman was instantly killed, a charge that if he used ordinary care, the fact that there was a safer method was not of itself contributory negligence was in conflict with another portion of the charge, that it was the duty of the fireman to take reasonable precaution to avoid accident for himself and if he selected the more dangerous of two ways, and thereby contributed to the injury, he could not recover, and therefore a ground for reversal.

APPEAL from judgment of Superior Court of Cedar Rapids, in favor of defendant.

CLEMENS & STEEL and PRESTON, WHEELER & MOFFIT, for appellant.
J. C. LEONARD and S. K. TRACY, for appellee.

ROBINSON, Ch. J. — On the 5th day of January, 1896, and for years before that time, the plaintiff's intestate, William H. Gibson, was in the service of the defendant, as locomotive engineer. Before one o'clock in the morning of the day specified, he arrived at Cedar Rapids, in charge of his engine, No. 69, on his run from the south, and commenced to inspect the engine, preparatory to giving it into the care of a hostler, who was to take it to the roundhouse. It was a part of the duty of the decedent to make the inspection, and, until it was completed, the engine remained in his care and subject to his

control. A part of the inspection consisted in examining certain eccentrics, and, to do so, he was obliged to touch them. To accomplish that, he passed an arm between spokes of a drive wheel of the engine; and while in that position, endeavoring to touch an eccentric, the locomotive was suddenly moved forward, and he was caught between a spoke and a driving rod, and instantly killed. The movement of the engine was caused by coupling cars to the rear end of the train. The defendant is alleged to have been negligent as follows: "1. In causing engine No. 69 to start forward while plaintiff's intestate was in such exposed position, without first giving him notice; 2, in causing engine No. 69 to start forward at the time and in the manner that it did; 3, in running a switch engine against the cars next behind said engine No. 69, and thereby moving said engine and tender forward; 4, in running said switch engine with great and unnecessary violence against the cars intervening between it and engine No. 69, thereby causing engine No. 69 to start forward, and catch and kill said intestate; 5, in not having said switch engine in proper repair and properly equipped, and under control and running at the proper rate of speed at the time it struck and pushed the cars between it and engine No. 69 against the tender of engine No. 69, thereby forcing said tender and engine forward; 6, in requiring plaintiff's intestate to inspect his engine at the time, in the manner, at the place, and under the circumstances hereinbefore detailed." The defendant denies all negligence on its part, and avers contributory negligence on the part of the decedent.

1. A witness named Angle testified that he saw the accident, and went to the decedent as soon as possible, and found him dead, but that he did not remain to see the body released, for the reason that he was taken by a train dispatcher or railroad officer to the ticket office. He was then asked why he went with the official, if he knew the official, whether he had any conversation with him, how much time elapsed after he saw the decedent fast in the engine before he arrived at the ticket office, and whether anything was said to him by the railroad employees then in charge before he went to the office, and while Gibson was being taken out; but objections to the questions were sustained, and of those rulings the plaintiff complains. The witness had said that the man who took him into the office had asked him if he saw the accident, and, upon receiving an affirmative answer, said, "We want you back here." There was nothing in the answer given nor in the questions to which objections were sustained which indicated that if anything was said to the witness while the body of Gibson was being removed from the engine, which was not shown, it was said by anyone who knew how the accident

occurred, or who was in any manner responsible for it, nor that what was said tended in any manner to explain the accident. The record fails to show anything from which it might be inferred that the testimony rejected was either relevant or competent, and it follows that the rulings of the court which rejected it were correct.

2. A witness named Swem was called by the plaintiff, and testified at some length. At a later day of the trial, he was recalled by the plaintiff, and a statement was made to him, as follows: "I asked you a question the other day, and it appears there is some misunderstanding about it. Do you wish to make any explanation about that?" This was objected to "as indefinite;" the objection was sustained; and of that ruling the plaintiff complains. We think it was correct. If the proposed explanation was material or relevant, the fact should have been indicated, at least by pointing out the testimony to which the question referred.

3. A map made by the city engineer November, 1895, was received in evidence, notwithstanding the objection of the plaintiff that it was incompetent and immaterial. It is said in argument that it was not shown to be correct, nor to represent the railway tracks as they were at the time of the accident. The map is not set out, and its contents can only be inferred from the statements of the counsel. There was no controversy, however, in regard to any fact which the map could have shown and its use in evidence, even if immaterial, could not have been prejudicial. Certainly, we cannot presume that it was, since it is not set out in the record.

4. There was a dispute respecting the precaution which should have been taken to avoid the accident, the defendant contending that the engine should have been uncoupled and separated from the train while the inspection was being made. A witness named Bull testified for the defendant that he worked as fireman with the decedent from June to September, 1895; that it was customary for the hostler to go onto the engine at the depot, where the engine would be uncoupled; and that the decedent then ran the engine for inspection to C avenue. The witness was then asked this question: "Tell the jury whether or not it was customary on that train to move the engine forward after it got in, to look her over, prior to the accident?" An objection by the plaintiff was overruled, and the witness answered, "Yes, sir; it was." The plaintiff complains of that ruling, but we think it was correct. The testimony of the witness had shown during what time he had personal knowledge of the custom of Gibson in regard to the inspection, and, if the answer could have been construed to apply to a time of which the witness

did not have knowledge, the fact could have been shown by cross-examination.

5. A witness named Cameron testified that he was an engineer, and made one run on Gibson's train before his death, and was permitted to testify, over the objection of the plaintiff, that on that occasion he took the engine "down between A and B avenues," to look it over. We are of the opinion that the testimony was proper as tending to show, with other evidence, where the engine of the decedent was ordinarily inspected. Cameron and another engineer testified that it was dangerous for a person to thrust an arm between the spokes of a locomotive wheel when it was at rest, because of the switching which was done when Gibson's train came in. It is objected that the facts to which the witness testified were not the subject of expert testimony; that it was sufficient to show the facts and the manner of doing the work; and that it was the province of the jury to determine whether the act was dangerous. The facts shown by the testimony make it clear beyond question that it was dangerous for the decedent to thrust his arm between spokes of the drive wheel as he did, and the jury could not have reached any other conclusion had the opinions of the witnesses not been given. Therefore the opinions of the witnesses could not have been prejudicial, although we are of the opinion that the record does not show that they were competent.

6. Several witnesses were permitted to testify, in substance, that it was the rule, if an engineer went into a dangerous place about his engine, for him to first notify the train crew or switching crew or all persons working about the train. The plaintiff contends that the testimony to that effect was erroneously admitted, because a rule of the defendant was not pleaded, citing *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. Rep. 340, and 19 N. W. Rep. 680; *Independent Dist. of Burlington v. Merchants' Nat. Bank*, 68 Iowa, 343, 27 N. W. Rep. 255; *Nicholaus v. Railway Co.*, 90 Iowa, 85, 57 N. W. Rep. 694; and *Strong v. Railway Co.*, 94 Iowa, 380, 62 N. W. Rep. 799. We do not think those cases are applicable to this case. They refer to the necessity of pleading affirmative defenses. The rule referred to by witnesses in this case does not appear to have been a formal or printed rule of the defendant, but a custom of employees, and the testimony in regard to it was competent and material, as tending to show the negligence on the part of the decedent which the defendant pleaded.

7. The appellant complains of a paragraph of the charge to the jury which was to the effect that if it was the duty of the decedent to inspect his engine upon his arrival in Cedar Rapids, at the time

of the accident, and it was the usual custom, before entering upon his duties, to notify the parties in charge of the switch engine that he was about to inspect his engine, and he failed to do so, he was guilty of contributory negligence, and the plaintiff could not recover. The ground of the complaint is that there was no evidence on which to base that instruction, but the complaint is based upon a misapprehension of the record. That shows that there was evidence which tended to show that it was the custom of the decedent to notify other employees of the defendant when he was about to inspect his engine, and that he failed to do so the night of the accident.

8. The ninth paragraph of the charge was as follows: "If you find from the evidence that inspecting the engine was one of the duties of the decedent that night on his arrival at Cedar Rapids, and it was also his duty, in doing so, to do it carefully, for his own safety, and to take reasonable precaution to avoid accident to himself in doing the work, and if, in inspecting the locomotive, one of the ways of doing it was safe, and the other way was dangerous, then the deceased should have adopted the less dangerous course in doing the work; and if he did not do so, but adopted the more dangerous way, and thereby contributed to the accident, then your verdict should be for the defendant." The evidence shows that the eccentrics might have been inspected by passing an arm between the spokes of the drive wheels, as was done by the decedent, or by crawling under the engine, but that the latter plan was not practiced. It was also shown that the engine might have been inspected when it rested against the train at the depot, or that it might have been run to a point some distance from the train, and have been there inspected; and the evidence tends to show that on the night of the accident the inspection was attempted after the engine was uncoupled, but before it was moved from the train. The decedent's run ended at Cedar Rapids, and his duties for the night would have been ended with the inspection and delivery of the engine to the hostler, to be placed in the roundhouse. It was the custom to attach to his train, as soon as he reached Cedar Rapids, several cars; and the men in charge of the switching waited on a side track with the switch engine, and, when the train stopped, proceeded to cut from the train cars to be left, if any, and to attach to it other cars which were to be taken out. That was done while the engine of the train was being inspected, and the decedent must have been fully aware of the fact. One of the complaints made of the ninth paragraph of the charge is that it required the jury to find whether it was the duty of the decedent to use reasonable precaution to do

his work carefully for his own safety. It is insisted that the question thus submitted was of law, which should have been decided by the court. That is true, but it is clear that the plaintiff could not have been prejudiced by that part of the charge, since it seemed to authorize the jury to find that it was not the duty of the decedent to use the care stated.

It is also objected that the paragraph quoted required the jury to determine whether one of the ways of inspecting the engine was safe, and the other dangerous, without any evidence upon which to base such a finding. We think that objection is without substantial merit. The danger of which the charge treated was not that to be apprehended from the moving of the engine when detached, but to its movements when caused by the switching. That there were two practical ways of making the inspection, one of which was safe from the danger referred to, and the other was not, is apparent from the evidence.

It is further insisted that the paragraph was erroneous in stating, in effect, that the decedent was required to choose the manner of inspection, which was less dangerous than the other, without regard to his care or negligence. It is claimed that whether the decedent, in making choice of methods, used ordinary care and prudence to protect himself from injury, was a question of fact for the jury to determine, and that the court erroneously treated it as a matter of law. We think that objection is well founded. It has been frequently held by this court that a person is not necessarily negligent in adopting a dangerous way of accomplishing an object, when a safe way is open to him; that whether he is negligent is not ordinarily a question of law, but of fact, to be determined according to the circumstances of the case, the reasons for doing what was done, and the care used to avoid danger. *Nichols v. Town of Laurens*, 96 Iowa, 388, 65 N. W. Rep. 335; *Graham v. Town of Oxford (Iowa)* 75 N. W. Rep. 473; *Mathews v. City of Cedar Rapids*, 80 Iowa, 460, 45 N. W. Rep. 894; *Kendall v. City of Albia*, 73 Iowa, 241, 34 N. W. Rep. 833; *Walker v. Decatur Co.*, 67 Iowa, 307, 25 N. W. Rep. 256; *Belair v. Railroad Co.*, 43 Iowa, 662. The paragraph under consideration did not permit the jury to consider the facts, if any, which tended to justify the decedent in making the inspection with his engine against the train, but required a verdict for the defendant if the way adopted was dangerous. It was therefore erroneous.

9. In the tenth paragraph of the charge the court instructed the jury that, if the decedent exercised ordinary and reasonable care in making the selection of the manner in which he should discharge the duties of inspecting his engine, he was not guilty of negligence

in choosing the mode of making the inspection. In the thirteenth paragraph the jury was told that if the decedent could have moved his engine from the train to make the inspection, and it would have been safer to do so, yet that fact alone would not conclusively show negligence, if he inspected the engine in the usual place and manner, and, in doing so, used ordinary and reasonable care. In the fourteenth paragraph the jury was told that, if the decedent used ordinary and reasonable care in inspecting the engine at the place where he did inspect it, the fact that it would have been safer for him to have moved the engine from the train to inspect it would not of itself constitute such contributory negligence as to defeat a recovery. It is claimed that these paragraphs are in conflict with the ninth paragraph of the charge, and no argument is required to show that the claim is well founded. A mere reading of the paragraph shows the conflict, and they cannot, on any reasonable theory, be construed to be in harmony. It is said that they were much more favorable to the plaintiff than they should have been; and that may be true, but there was no attempt made to take the case from the jury. It was submitted on the theory that the evidence would have sustained a verdict for the plaintiff. Since that was done, the jury should have been properly instructed. *Hoben v. Railroad Co.*, 20 Iowa, 562; *Conway v. Railroad Co.*, 50 Iowa, 465. See *State v. Hartzell*, 58 Iowa, 520, 12 N. W. Rep. 557; *Hawes v. Railway Co.*, 64 Iowa, 315, 20 N. W. Rep. 717; *State v. Keasling*, 74 Iowa, 528, 38 N. W. Rep. 397; *Pumphrey v. Walker*, 75 Iowa, 408, 39 N. W. Rep. 671; *Neville v. Railway Co.*, 79 Iowa, 232, 44 N. W. Rep. 367.

For the errors pointed out the judgment of the Superior Court is reversed.

BROWNFIELD v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

Supreme Court, Iowa, January, 1899.

RES IPSA LOQUITUR. — The rule of *res ipsa loquitur* does not apply to the case of a fireman injured by the derailment of a locomotive caused by a broken axle.

EXPERT EVIDENCE. — Expert testimony as to whether a broken axle of a locomotive might have derailed the train was admissible as was also expert testimony as to whether certain peculiar motions of the locomotive before the accident indicated a broken axle.

ASSUMPTION OF RISK. — The fact that the engineer remained at his post on the locomotive knowing there was some defect in it warranted the fireman in relying upon the superior knowledge of the engineer, and how far this would operate as an excuse for his conduct in remaining upon the locomotive though he was aware that it was acting strangely, was for the jury

APPEAL from District Court, Washington County. At the close of the evidence for plaintiff, the jury, by direction of the court, returned a verdict for defendant.

M. A. McCoid and J. F. Henderson, for appellant.

Carroll Wright and Scofield & Scofield, for appellee.

Waterman, J. — Plaintiff was in the employ of defendant as a locomotive fireman, and had so been at different times for a number of years prior to his injury. At the time complained of, he was engaged on his engine, which was hauling a freight train from Rock Island, Ill., over defendant's road, to Eldon, Iowa. The engineer had an order, on leaving Washington, which was an intermediate station, to run at a speed of thirty-five miles an hour to Brighton, thirteen miles west. Plaintiff knew of this order. Some little time after leaving Washington, plaintiff noticed that something was wrong with the engine. As he says, "It was jerking backward and forward in a strange way. It was jerking and twisting around, and riding rough. * * * It was knocking, hitting, or kicking, or something of that kind. * * * I hadn't seen her act that way before, nor anything like it." Plaintiff says that he thought this might have been caused by the slack wedge, between the engine and the tender, being out. He examined, and found this was not the cause. After this, a stop was made at Verdi, seven miles from Washington, but no examination was made, either by plaintiff or the engineer. After leaving this station, and when at the top of what is called "Verdi Hill," the strange action of the engine continuing, plaintiff asked the engineer "if he hadn't better stop the engine before he went down the hill," to which the latter responded, "No; when he got to Brighton, he would look the engine over." At the foot of the hill, the engine left the track, and, in the general wreck that ensued, plaintiff was injured. After the accident, one of the drive wheels of the engine was found broken from its axle, and lying beside the track.

2. The amended petition, upon which the case was tried, charges negligence in many particulars; in the construction of the engine, the failure to inspect it, the condition of the track, the rate of speed, and several other matters. The only evidence, however, related to some defect in the engine, and to the conduct of the engineer in running the train after such defect was or should have been known

to him. Plaintiff, to make his case, proved the facts substantially as we have stated them, and rested. His contention is that the jury would have been justified in finding, from these facts, some one or more of the many acts of negligence charged. Counsel state the rule for which they contend in these words: "In case of an accident to an employee, from collision, derailment, or latent defect in machinery, negligence is presumed, until the contrary is shown." This is the rule applied in passenger cases, but we had supposed it too well settled in this State to be the subject of serious controversy that, in any and all cases, the burden is upon an employee or servant to prove the negligence that is the proximate cause of his injury. *Baldwin v. Railroad Co.*, 68 Iowa, 37, 25 N. W. Rep. 918; *Case v. Railway Co.*, 64 Iowa, 762, 21 N. W. Rep. 30; *Kuhns v. Railway Co.*, 70 Iowa, 565, 31 N. W. Rep. 868; *Haden v. Railroad Co.*, 99 Iowa, 735, 48 N. W. Rep. 733. It is true that the happening of an accident to machinery may, under certain circumstances, raise a presumption that the machinery was in some way defective; but this is not enough to fix the liability of the master. It must be further shown, in order to hold him, that he had knowledge of such defect, or would have had such knowledge if he had exercised reasonable care and diligence. We may say, further, that the doctrine of *res ipsa loquitur*, for which plaintiff contends, is not confined wholly to cases of injuries to passengers by carriers, but is extended to cover some other exceptional circumstances. These are mentioned, in a general way, in *Case v. Railway Co.*, *supra*. Just what facts will bring a case within the rule it is needless now to discuss. It is sufficient to say that the rule does not apply in a case of this character. But plaintiff does not wholly rely upon this rule. He claims that the peculiar action of the engine indicated that it was in some way defective, and that this fact was known to the engineer, whose knowledge will be imputed to defendant. In response to this, defendant says there is no showing that the defect in the engine, whatever it was, caused the accident. This leads us to a consideration of certain evidence offered by plaintiff, and which was ruled out by the court.

3. Plaintiff called three expert witnesses, to whom questions were propounded, which were objected to by defendant. Practically, all of these objections were sustained. Without going into details, we will say that, in some instances, these rulings were correct; but, in so far as the questions sought to elicit an opinion as to whether the peculiar action of the engine indicated a broken axle, and whether a broken axle might have derailed the train, we think the testimony should have been received. Presumptively, this evidence, if taken,

would have been favorable to plaintiff. The case would then have stood thus: There was evidence from which the jury could have found that the axle of the engine was broken before the train reached Verdi; that the engineer knew or should have known the fact, or, at least, that he knew or should have known that it was dangerous to proceed with the engine acting as it did. So, too, it was particularly the province of the jury to say whether the broken axle was the proximate cause of the accident. *Ward v. Railway Co.*, 97 Iowa, 50, 65 N. W. Rep. 999; *Laird v. Town of Otsego* (Wis.), 62 N. W. Rep. 1042; *Potter v. Gas Co.* (Pa. Sup.), 39 Atl. Rep. 7. When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result. *Settle v. Railroad Co.* (Mo. Sup.), 30 S. W. Rep. 125. We think the testimony mentioned should have been received, and, if it proved favorable to plaintiff, it would have made a case for the jury.

4. It is urged, however, as matter of defense, that plaintiff assumed all risk, and waived his right to recover, by remaining on the engine after he knew or should have known the danger in so doing. And it is thought the facts disclosed by plaintiff in making his case support this plea. Were we prepared to hold, under the circumstances of this case, that if plaintiff knew, before reaching Verdi, the danger of remaining at his post on the engine, he should have abandoned the train at that point, yet we would have to say that, as here presented, the issue of waiver should have gone to the jury. The engineer knew there was some defect in the engine; yet he continued upon his run, giving the matter no serious attention. Even if plaintiff suspected danger, or feared grave consequences, surely he was warranted in relying, to some extent, upon the superior knowledge of the engineer. How far this would operate as an excuse for his conduct in remaining on the engine was for the jury, and not the court, to say. But, while plaintiff knew that the engine was acting strangely, the evidence tends to show that he did not know the cause; and it does not appear that he thought there was danger in continuing in the performance of his duties. Whether, in the exercise of ordinary care, he should have appreciated his peril, was a conclusion to be drawn by the jury from all the evidence in the case. What we say here has a bearing, not only on the plea of assumption of risk, but also on the issue of contributory negligence.

5. The result we reach renders it unnecessary for us to pass upon the correctness of the trial court's ruling in permitting defendant,

at the close of plaintiff's case, to file an amendment setting up the assumption of risk by plaintiff. We find no serious errors in the admission or rejection of testimony, other than those mentioned.

For the reasons given, the judgment will be reversed.

BIGGS v. CONSOLIDATED BARB-WIRE COMPANY.

Supreme Court, Kansas, February, 1899.

TRESPASSING CHILDREN INJURED ON DANGEROUS PREMISES. —

1. The maintenance of dangerous machinery on private grounds, unprotected from the visits of trespassing children, renders the owner thereof, who has knowledge that children and others are accustomed to frequent said grounds, and climb upon the structures supporting said dangerous appliances, liable in damages to the next of kin of a boy fourteen years of age, who was caught in said exposed machinery, and killed.
2. In this case the question whether the boy was of sufficient intelligence, natural capacity, foresight, and judgment as to be guilty of contributory negligence is for the jury.
3. The case of *Price v. Water Co.*, 58 Kan. 551 (3 Am. Neg. Rep. 392), followed. (Syllabus by the Court.)

FROM a judgment of District Court, Douglas County, in favor of defendant, plaintiff brings error.

R. E. MELVIN, for plaintiff in error.

W. W. NEVISON, for defendant in error.

SMITH, J. — This was an action commenced in the court below for the recovery of damages by reason of the death of Leigh Walter Howell, which was caused, as is alleged, by the wrongful act, neglect, and default of the defendant in error, the Consolidated Barb-wire Company. On December 2, 1897, an amended petition was filed in the cause, to which a general demurrer was interposed by the defendant wire company. This demurrer was sustained by the court, and, the plaintiff below electing to stand thereon, judgment was rendered in favor of the defendant.

The question for our consideration is whether the amended petition states facts sufficient to constitute a cause of action. It is alleged in said amended petition that the plaintiff, W. P. Biggs, on July 26, 1897, was duly appointed administrator of the estate of Leigh Walter Howell, deceased; that the defendant is a corporation, and had for a long time operated a wire-nail and barb-wire plant on the south bank of the Kansas river, at Lawrence; that said plant was run by

water power, and that the power is transmitted to said wire mill and plant about 125 feet, by a certain shaft owned and controlled by the defendant; that said shaft is about six inches in diameter, and is located about fifteen or eighteen feet above the water; and that said shafting is supported on timbers which are about eighteen inches apart, said timbers being supported by a stone buttress or pier; and that about twelve or eighteen feet west of said buttress or pier is a collar or coupling, about eight inches in diameter, around said shaft, and in the outer rim of said collar or coupling is a bolt or set screw which projects out some four or five inches from the outer rim of the collar or coupling; that the shafting and connections and attachments are open and exposed, and in no manner covered or inclosed; that the shaft revolves at the rate of about 100 to 150 revolutions per minute; that on the 21st day of April, 1897, said Leigh Walter Howell was fishing and playing near to and under said shaft, and that in attempting to climb up from below, on a ladder for that purpose built by the defendant, onto the timbers on either side of said shaft, the aforesaid bolt or set screw which projected from the collar or coupling on said shaft caught in the back of his coat, and he was whirled around said shaft, and against said timbers, with irresistible force, and killed, dying as the result of being so caught by said set screw; that the barb-wire company was guilty of gross carelessness towards the deceased, in that, through its officers, it had actual notice of the faulty construction of said machinery, and that at the place of the accident it was unsafe and dangerous; that the barb-wire company was guilty of gross carelessness towards the deceased, in not inclosing or boxing the collar, coupling, and screw, and in leaving same exposed and open, and, further, in allowing the set screw or bolt to project four or five inches from the rim of the collar or coupling, and in not boxing same, and was careless in leaving the machinery and timbers supporting the same, and the immediate surroundings (which were attractive to children), open and exposed, wholly unguarded and unfenced; that the deceased could not see the bolt or set screw, by reason of the shaft revolving so fast as to render it invisible; that the place where plaintiff's intestate was killed, and the machinery and timbers supporting the same, and the surroundings, were attractive to children; and that children, and particularly boys, were in the habit of resorting there for the purpose of amusement, and men and boys were in the habit of climbing about on the timbers which supported the shaft, for the purpose of fishing and playing, and they did fish from the timbers, and that the barb-wire company had notice of such facts; that the defendant company knew that the said machinery was unsafe and dangerous,

for the reason that other persons had been caught by said screw; that said shaft is built across what would be New Hampshire street if projected ten feet into the water; that said dangerous machinery was left in an open and exposed place, unfenced and unprotected, and in a place attractive to children; that at the time of the accident, April 21st, there were no signboards on or about the said premises, but previous to that time there had been, and same had been put up and erected by defendant company, but that since April 21st the defendant had placed and erected danger boards on and around said premises; that Leigh Walter Howell, the deceased, was a boy of fourteen years of age, intelligent, healthy, and promising, at the time of his death; that he left a father, brother, and sister surviving him.

All the allegations of the petition being admitted, together with such facts as are properly inferable from the language used, we are unable to perceive that they demand the application of any different rule than that heretofore adopted and adhered to by this court in cases substantially similar. The structure erected and maintained by the wire company was of such a nature as to be attractive to children, especially to boys. It was situated in a place about which boys and men congregated for the purpose of amusement, and boys were in the habit of climbing about on the timbers that supported the shaft, for the purpose of fishing and playing, of which fact the wire company had actual notice. At the top of the structure was a collar or coupling, in which was a set screw projecting four or five inches from the outer rim of the coupling. When in motion, this collar or coupling and the set screw revolved at the rate of from 100 to 150 revolutions per minute, by reason of the velocity of the shaft, so that the screw was invisible. There was a ladder extending to the top of the structure, upon which the boy climbed until, when near the top, he was caught in the back of the coat by this revolving set screw, which projected from the collar; and, being whirled around the shaft and against the timbers, he was killed.

The case of *Price v. Water Co.*, 58 Kan. 551, 3 Am. Neg. Rep. 392, 50 Pac. Rep. 450, is an authority directly in point. In that case the boy drowned in the reservoir of the water company was bright and intelligent. He was a trespasser on the grounds of the water company. The grounds about the reservoirs were inclosed with a barb-wire fence ten to twelve wires high. The deceased entered the inclosure by climbing over a stile. The watchman of the water company was aware of the habit of boys to climb over the stile, and permitted them to do so without objection. The boy went with some companions to the reservoir to fish and play, and, venturing

upon an "apron," which extended from the bank out into one of the reservoirs, was drowned. His parents had frequently warned him of the danger of going to the reservoir, and he had trespassed there once before, without their knowledge. In the Price Case, as in the case at bar, two grounds of error were urged: First, that the defendant was not negligent in maintaining the premises; second, that the deceased was guilty of contributory negligence. The two grounds were disposed of by this court in an opinion reviewing the authorities. Among other things, the court said: "It is, however, contended by the defendant in error that, inasmuch as the deceased was a trespasser upon its grounds, it owed to him no duty to guard against the accident which occurred. Without doubt, the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who go upon them, not by invitation, express or implied, but for pleasure or through curiosity. Cooley, Torts (2d ed.), 718; 1 Thomp Neg. 303; Dobbins v. Railway Co. (Tex. Sup.), 41 S. W. Rep. 62. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit, and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express." The court quotes approvingly from the case of Railway Co. v. Fitzsimmons, 22 Kan. 691, when passing on the question of contributory negligence of the deceased: "Boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures, — instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence, would not be. And the question of negligence is in nearly all cases one of fact for the jury, whether the person charged with negligence is of full age or not." See, also, Kinchlow v. Elevator Co., 57 Kan. 374, 46 Pac. Rep. 703; Railway Co. v. Carlson, 58 Kan. 62, 2 Am. Neg. Rep. 536, 48 Pac. Rep. 635.

From the peculiar character of the structure upon which the plaintiff's intestate was killed, and its proximity to the water of the Kansas river, it certainly presented to the average boy a desirable place from which to fish; and considering the inbred disposition and ever-present impulse in children, especially boys, to explore and

investigate, this structure over the water appealed strongly to such natural inclination. The barb-wire company had notice that this structure was used by men and boys as a fishing platform; and, having this notice, it was a question for the jury to say whether it was negligent in maintaining it in its condition at the time of the accident. The death of the plaintiff's intestate was directly caused by the revolving set screw attached to the coupling on the shafting which was supported by the upright timbers. Its velocity was so great that neither a boy of fourteen nor a man of mature years could have seen it. Except for the projecting pin on said coupling, the appliance would probably have been safe, and no harm would have resulted to the boy. It was not boxed or covered.

It is contended by the defendant in error that the prior decisions of this court above cited are not precedents in the case at bar, for the reason that in none of them has a boy of the age of fourteen years been held incapable of knowing the consequences of his acts. We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with contributory negligence in a case like the present. It is peculiarly within the province of the jury to determine such questions. In the Carlson Case, above cited, it is said: "As a matter of fact, we know that there is great difference in the capacity of different children at the same age, owing as well to differences in education and surroundings as to natural capacity. The question as to the capacity of a particular child at a particular time, to exercise care in avoiding a particular danger, is one of fact, falling within the province of the jury to determine."

The judgment of the court below will be reversed, with instructions to overrule the demurrer to the petition. All the justices concurring.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY v. MEDARIS.

Supreme Court, Kansas, January, 1899.

STATUTE — RAILROADS — INJURIES TO EMPLOYEES — FELLOW-SERVANTS. — A stone mason employed by a railroad company in setting curbing around a depot and office building, and who was injured by the falling of a curbstone which was left standing in an insecure position by a co-employee, is not within the protection of the "Fellow Servant Act" (Laws 1874, c. 93, sec. 1), which makes railroad companies liable to their employees for damages resulting from the negligence of other employees. (Syllabus by the Court.)

FROM a judgment of District Court, Labette County, in favor of plaintiff, defendant brings error.

T. N. SEDGWICK, for plaintiff in error.

W. D. ATKINSON, for defendant in error.

JOHNSTON, J. — C. F. Medaris recovered a judgment against the Missouri, Kansas and Texas Railway Company for personal injuries sustained by him while employed in setting a curbing around the office building and depot of the railway company in Parsons. The curbstones had been prepared elsewhere, and shipped to Parsons, and unloaded near the building around which they were to be placed. The men employed to set the curbing dug a ditch, and several of the curbstones were brought up and left on the side of the ditch, ready to be placed. While setting a curbstone, another one, which had been left standing unsupported on the edge of the ditch, was upset, and fell upon the leg of Medaris, causing a permanent injury. He alleged that the injury resulted from the negligence of his co-employees, in leaving the stone in an insecure position; and the jury found that the allegation was sustained by the testimony, and awarded damages in the sum of \$3,000.

The question we are called upon to determine is whether Medaris is within the protection of the statute which makes railway companies liable for damages to co-employees caused by the negligence of fellow-servants (Laws 1874, c. 93, sec. 1). From the facts, it appears that there was no common-law liability for the injury sustained, but, if any exists, it arises under the "Fellow Servant Act" referred to. Whether Medaris is entitled to the benefit of this law depends upon the character of the work in which he was engaged, and not on the mere fact that he was an employee of a railroad company. The validity of the law has been sustained as against the charge that it was class legislation, on the ground that the hazardous character of the business of operating a railroad justified the passage of a law for the protection of those engaged in that service. The rule of liability applied under the statute is different from that which ordinarily applies between master and servant; but this difference is founded on the hazardous character of the service, and is not intended as a discrimination between employers. The statute would certainly be open to objection if a different rule of liability was applied to a railroad company than is applied to other employers under like circumstances and conditions. The hazards incident to the use and operation of railroads is a natural and reasonable classification, which justifies the exceptional legislation; for if the statute was not given that interpretation, and limited in its operation to the protection of those engaged in the hazardous service, it could not be upheld.

In *Union Trust Co. v. Thomason*, 25 Kan. 1, the statute was held to apply only to those engaged in the hazardous business of operating railroads. In *Railway Co. v. Haley*, 25 Kan. 53, the act was again construed, and it was remarked that it "embraces only those persons more or less exposed to the hazards of the business of railroad-ing." We have had a number of border cases in which the interpretation referred to has been pushed to the uttermost limit, but they have all been cases where the injury occurred in connection with the use and operation of the railroad. In *Railway Co. v. Harris*, 33 Kan. 416, 6 Pac. Rep. 571, it was held to apply to a sectionman employed in repairing a track, and where he was injured while assisting in removing a rail from a car on the track. In *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. Rep. 567, the injury was received by a person while loading rails on a car to be taken to other portions of the company's road. It was held that the services were of such a character as brought him within the protection of the act. *Railroad Co. v. Brassfield*, 51 Kan. 167, 32 Pac. Rep. 814, is a similar case, where a sectionman was injured while unloading material from a car for the purpose of repairing the railroad. The hazardous character of the service entitled him to the benefit of the act. In *Railroad Co. v. Pontius*, 52 Kan. 264, 34 Pac. Rep. 739, the act was held to apply to a bridge carpenter, who was injured while loading timbers on a car for transportation over the company's road. Emphasis was placed on the statement that the accident did not happen while he was engaged in building a bridge, but that it occurred in connection with the operation of a railroad; that is, in loading a car which was on the track for transportation over the railroad. In *Railroad Co. v. Vincent*, 56 Kan. 344, 43 Pac. Rep. 251, an employee of a railroad was injured by the negligence of his co-employee while engaged in repairing the railroad, and the claimed liability against the company was sustained.

In each of these cases it will be observed that the injured person held to be entitled to the benefit of the act was engaged in services connected with the use and operation of a railroad. Here, however, the service which Medaris was performing did not expose him to the hazards peculiar to the business of using and operating a railroad. He was not at work on a railroad, and his injury was not caused by the operation of a railroad or the use of any railroad appliance. It is true there were railroad tracks near the place where he was at work, but no train was passing or near to the place where Medaris was at work at the time the injury was inflicted. It is true, also, that he was at work for a railroad company, and upon the land of a railroad company; but this does not entitle him to the benefits of

the act. He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad. As the jury specially found, the work in which he was engaged involved no more risk or hazard than it would if the same work was being done for an individual at the same time and place. The benefits of the act can no more be claimed by him than they could by the carpenter who laid the floor in the office building, or nailed the shingles on its roof. No stronger claim could be made for him than could for a person injured while hauling the rock from the quarry to the place, where the curbing was to be set.

As was held by the Supreme Court of Minnesota, one rule of liability cannot be established for a railroad company as such, and another for other employers, under like circumstances and conditions. To avoid the imputation of class legislation, the distinction must be based upon a difference in the nature of the employment; "but no just reason can be suggested why such difference should be founded, not on the character of the employment, nor on the dangers to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another when the employment and its hazards are precisely the same." *Lavallee v. Railway Co.*, 40 Minn. 249, 41 N. W. Rep. 974. See, also, *Johnson v. Railway Co. (Minn.)*, 45 N. W. Rep. 156; *Deppe v. Railroad Co.*, 36 Iowa, 52; *Stroble v. Railway Co.*, 70 Iowa, 555, 31 N. W. Rep. 63. It is difficult to see how the validity of the law can be sustained, unless it is interpreted, as was stated in *Railway Co. v. Haley*, *supra*, to "embrace only those persons more or less exposed to the hazards of the business of railroading." We feel compelled to hold that the plaintiff below was not engaged in that kind of service, when the injury was inflicted, and, therefore, that no liability against the company, under the statute, arises in his favor.

Judgment reversed.

ALLEN, J., concurred.

DOSTER, Ch. J. — I concur in the decision of this case, but only upon the assumption that the "Fellow Servant Act" of 1874 is not an amendment of the general railroad incorporation law. If it were such, I should have no doubt of the power of the Legislature to impose upon railroad corporations the obligation to respond in damages for injuries negligently inflicted by one of their employees upon another, whether engaged in the nonhazardous branches of the

railroad service or otherwise. This would result from section 1 of article 12 of the State Constitution, which ordains that "corporations may be created under general laws; but all such laws may be amended or repealed." The act in question has been, however, regarded as applying, not only to railroad corporations proper, but to other kinds of corporations, and to individuals engaged in the business of operating railroads. *Trust Co. v. Thomason*, 25 Kan. 1; *Rouse v. Harry*, 55 Kan. 589, 40 Pac. Rep. 1007. If it can be thus extended to cover such classes of cases, it cannot be regarded as a mere amendment of the railroad incorporation act, but must be considered as a remedial statute, applying rather to the business of railroad operation than as attaching qualifications and conditions to the exercise of railroad franchises. The questions herein suggested were not discussed before us, and as to what should be the proper view to be taken of them I have no matured judgment. However, I yield formal assent to the decision made, but without feeling myself bound by it as in other and ordinary cases.

ATCHISON V. PLUNKETT.

Court of Appeals, Kansas, Northern Department, E. D., January, 1899.

HIGHWAYS — STRUCTURE OVERHANGING STREETS FALLING UPON

PERSON PASSING. — 1. The law casts upon owners of buildings abutting upon the streets, who attach thereto structures overhanging the street, the duty of preventing such overhanging structures becoming in any way dangerous to persons lawfully passing upon the highway; and where the plaintiff shows that while lawfully in the highway he is injured by some part of such a structure falling upon him, the burden rests upon such owner to show that he was blameless in the premises.

2. One in the lawful use of a street has a right to assume it is reasonably safe, and, even if he knew of the existence of an obstruction, he had a right to assume that it was not dangerous unless warned to the contrary, or the danger was obvious upon a casual inspection thereof.

(Syllabus by the Court.)

FROM a judgment of District Court, Leavenworth County, in favor of plaintiff, defendant brings error. This action was for damages for personal injuries sustained by plaintiff from the fall of a stone which was suspended upon a beam attached to defendant's ice house, and that extended over a street in the city of Leavenworth. The plaintiff was standing upon the street near the ice house when the stone fell upon him. A verdict was rendered for plaintiff for \$800,

of which he voluntarily remitted \$400 upon the hearing of a motion for a new trial, and judgment was entered for \$400.

J. H. GILLPATRICK and A. E. DEMPSEY, for plaintiff in error.

J. C. PETHERBRIDGE and BAKER, HOOK & ATWOOD, for defendant in error.

MAHAN, P. J. — It is contended under the first assignment of error that the court erred in sustaining the plaintiff's objection to questions addressed to the witnesses Kirmeyer and Kasper as to what defendant in error had been doing about the ice house on former occasions. Plaintiff in error has no ground for complaint upon this score. The court was exceedingly liberal with him, allowing him great latitude, both in the examination of his own witnesses and in the cross-examination of those of the plaintiff. It was immaterial in what the plaintiff was engaged while at the ice house of the defendant upon former occasions, and the questions, and any possible answers that might have been made thereto, would have thrown no light upon the issues being tried by the court. They were irrelevant, and the objection was properly sustained.

The first contention under the second assignment of error is that the court erroneously gave the first instructions to the jury, to the effect that, if the defendant placed a dangerous obstruction over the highway in violation of law, he was responsible to anyone lawfully upon the street for any damages sustained by reason of such unlawful obstruction on the street. The ground of the contention is that there was no evidence that the obstruction, or the rock which fell therefrom, was over any part of the highway. In this counsel for plaintiff in error are mistaken. Not only was the evidence on the part of the plaintiff sufficient to establish that fact, but the defendant himself admitted upon his cross-examination that such was the fact.

Under this assignment plaintiff in error next contends that it was error for the court to give instruction No. 2, to the effect that the law casts upon owners of buildings abutting upon streets the duty of preventing their becoming in any way dangerous to persons lawfully passing upon the highway, and, if a failure in this respect results in damages, it is *prima facie* evidence of negligence. This instruction was applicable to one phase of the case. If, as the defendant contended in his answer and upon the trial, it should have appeared to the jury that the obstruction was not over the highway, but immediately upon the line thereof, this instruction would have been applicable; and there is no question about the correctness of the principle enunciated therein. Plaintiff in error contends that the burden always is upon the plaintiff to show that the defendant

was negligent. This is true. But when the plaintiff has shown that he was injured by some material — timber, stone, or other matter — falling from the building upon him while upon the street, there is *prima facie* negligence. *Mullen v. St. John*, 57 N. Y. 567.

Plaintiff in error also contends, under this assignment, that the court erred in saying to the jury that the plaintiff had a right to assume that the street was reasonably safe; that the law did not require him to examine beyond a reasonable and ordinary use of his senses; and that, even if he did know of the existence of the alleged obstruction of the defendant, including the projecting timbers and suspended stone, he had a right to assume that they were safe, unless warned to the contrary, and unless it was obvious to him, as a casual observer, that they were not safe. There can be no question of the correctness of this instruction applied to the facts of the case. It is true that a party may not walk deliberately into danger, but, being upon a highway, he is not required to anticipate that any one will obstruct the street in a dangerous manner, unless it is apparent to him, in the usual course of the use of the street, by casual observation, that such obstruction is dangerous.

Again, under this assignment the plaintiff in error contends that the court erred in instructing the jury that in a criminal proceeding a discharge of the accused is conclusive of his innocence of such charge. As applied to the facts in this case, the giving of this instruction was not error. The defendant had offered evidence to the effect that he, as one of the police commissioners, had procured the arrest of the plaintiff some years before that on a charge of being a trespasser upon his premises in violation of the city ordinance; that he was discharged therefrom, it not appearing clearly whether he was tried or not. It was a matter wholly foreign to the issues in the case, could only have tended to prejudice the plaintiff in the minds of the jury, and the court might have gone much further in its instruction to the jury in regard to that evidence than it did.

The third contention is that the court refused to grant the defendant a new trial on account of misconduct of counsel for the plaintiff and misconduct of the jury. There is nothing in the record whatever disclosing that either counsel for the plaintiff or the jury were guilty of any misconduct whatever. The contention is wholly unsupported by the record.

The fourth contention is that the trial court failed to grant the plaintiff a new trial by reason of the several alleged errors hereinbefore noticed, and because it appeared that there were excessive damages given by the jury under the influence of passion and prejudice, and that a remittitur of a part of such damage could not and did not

cure the injury or wrong done to the defendant by reason of such passion and prejudice. It does not appear, either from the record or by a careful consideration of the evidence, that the jury were actuated by any passion or prejudice. There is no expression of the trial court that would tend to show that it was of the opinion that there was any such passion or prejudice, or even that the verdict of the jury was excessive. The record does not even disclose that the motion for a new trial was denied because of the remittitur. There was an effort upon the part of the defendant to have the court say in the record that passion and prejudice did appear, but the court declined so to do, and struck from the record everything indicating such an opinion or belief. Eight hundred dollars would not be an unreasonable verdict under the testimony and findings of fact made by the jury. At least it cannot be said that the mere fact that \$800 was awarded by the jury in its verdict was evidence of the existence of passion and prejudice in their minds, under the evidence disclosed by the record.

The judgment is affirmed.

MATHEWS v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

Supreme Court, Kansas, December, 1898.

PASSENGER INJURED ON CONNECTING LINE OF ROAD FROM WHICH HE BOUGHT TICKET AND BRINGING ACTION AGAINST LATTER.

— Where one railroad company, owning most of the stock of another railroad company, and being desirous of utilizing it as a connecting line for through business, enters into a through-traffic agreement with it, by the terms of which a division of earnings on such traffic is stipulated for, and matters pertaining to through rates and other like business are intrusted in great part to the management of the first-mentioned company, which upon its part undertakes to guaranty the bonds, and generally to finance the affairs of the last-mentioned company, but the last-mentioned company retains the entire management of its own train service and operating department, employs, controls, and discharges its own employees, and pays the expenses of such department, *held*, that as to a passenger riding over the line of the last-mentioned company, upon a through ticket sold by the first-mentioned company, containing a clause limiting responsibility for injuries en route to those occurring on the line of such company, damages cannot be recovered from the selling company for injuries received upon the line of the other one, through the negligence of its employees.

(Syllabus by the Court.)

FROM a judgment of Court of Common Pleas, Wyandotte County, in favor of defendant, plaintiff brings error.

T. P. ANDERSON, BEN S. HENDERSON and GEO. W. LITTICK, for plaintiff in error.

A. A. HURD and MILLS, SMITH & HOBBS, for defendant in error.

The facts and points decided are stated in the syllabus by the court.

Judgment affirmed.

Opinion by DOSTER, Ch. J.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. CARTER.

Supreme Court, Kansas, December, 1898.

BRAKEMAN THROWN FROM TOP OF FREIGHT CAR BY SUDDEN STOP OF TRAIN. — 1. In an action against a railway company to recover damages for wrongfully causing the death of a brakeman by a sudden application of air brakes, causing him to be thrown from the top of a car and killed, it is not reversible error to admit the printed rules of the railway company governing the management of its trains by its employees, even though not strictly applicable to the circumstances of the case, where the measure of care imposed by the rule read in evidence is not greater than that the law imposes under the facts of the case.

2. An engineer in charge of an engine hauling a freight train, when approaching a work train in plain view ahead of him, who approaches so near to the work train, and at such a rate of speed, that it is necessary to make a sudden and violent application of the air brakes with which his train is equipped in order to prevent a collision with it, and who, under the circumstances, so applies the air brakes as to cause his engine to break loose from the train, and the cars to become suddenly stopped, is guilty of negligence, and the company is liable for the death of a brakeman thrown from the top of a freight car by the sudden stoppage of it in such manner.

(Syllabus by the Court.)

FROM a judgment of District Court, Lyon County, in favor of plaintiff, defendant brings error.

A. A. HURD, O. J. WOOD, and W. LITTLEFIELD, for plaintiff in error.

BUCK & SPENCER, L. M. CARTER, and GRAVES & DICKSON, for defendant in error.

The facts and points decided are stated in the syllabus by the court.

Judgment affirmed.

Opinion by ALLEN, J.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. KELLER.

Court of Appeals, Kentucky, November, 1898.

CARRIER AND PASSENGER — RIGHT TO SHELTER IN WAITING ROOM AFTER ALIGHTING. — A passenger alighting from a train at a station does not immediately cease to be a passenger, but continues to be such and is entitled to protection from the weather in the station for a reasonable length of time.

OBSTRUCTION BY FREIGHT TRAIN OF PASSAGEWAY TO STATION WHEREBY PASSENGER WAS COMPELLED TO REMAIN EXPOSED TO STORM. — A railroad company that obstructed the way from a train to the station by a freight train is liable in punitive damages to a passenger who was compelled to remain in a storm of rain and hail until her clothing became wet and soiled, and who was subjected to the jeers of the railroad employees while so exposed to the storm.

APPEAL from judgment, Circuit Court, Bullitt County, in favor of plaintiff.

FAIRLEIGH & STRAUS and EDWARD W. HINES, for appellant.

CHARLES CARROLL, for appellee.

WHITE, J. — The facts of this case appear to be that appellee, in company with some other ladies and a little boy, bought tickets for passage over appellant's road, at Louisville, to go to Shepherdsville. They were carried the distance, and when the passenger train reached the station at Shepherdsville it was raining and hailing very hard. Appellee was assisted from the passenger train by the brakeman to the ground, and there left. She had no umbrella. It was raining and hailing. Just before this passenger train came to the depot a freight train of thirty-one cars came also to the depot, and this freight train was on the track between the depot and the passenger train from which appellee alighted. To seek shelter from the storm, appellee must either crowd under the freight train and get into the depot, or go around the freight train and go back to the depot on the other side of the freight train. To go around the freight train, appellee must travel between the tracks, with a train on either track; and to go the shorter distance would be to go in front of the engine, something near 100 yards, — the other way, about 200 yards, — and then the same distance back to the depot. On the side of the passenger train opposite the freight train there was no house, and, on account of a wire fence, appellee could not

have gotten out that way. Appellee did neither of these things, but stood there in the storm, without protection from the rain and hail, till the freight train was moved out of the way, this time variously estimated at from two to ten minutes. The proof shows that while appellee was thus subjected to the rain and storm she was laughed at and tantalized by some of the employees on the train. When appellee reached the depot, she was wet, and her clothes soiled. There she found her friend waiting, and she went her way. This action was brought for the damage for being compelled to remain in the storm, because no shelter was provided, or rather because of the negligent obstruction by the freight train of the way to the depot. Appellant, by its answer, denied all negligence; denied its duty to keep an unobstructed passage to its waiting room from the train; denied that, at the time appellee was subjected to the wetting from the storm, it owed her any duty, or that she was then a passenger; pleaded that the injury was caused by the act of God, and not by any negligence or carelessness on its part. A trial resulted in a verdict for appellee in the sum of \$260. After motion and grounds for new trial had been overruled, this appeal is prosecuted.

The reasons assigned for a new trial are: Refusal to peremptorily instruct the jury to find for appellant; in giving instructions to the jury; in refusing instructions asked for by appellant; that the verdict is contrary to law and not supported by the evidence, and is excessive.

Counsel for appellant contends that, when appellee was assisted from the passenger train at the depot for which she purchased her ticket, the appellant ceased to owe her any duty; that she ceased to be a passenger, and the appellant was not negligent in permitting the freight train to stand on the track nearest the depot; and that, as there was a way open between the tracks to go to the town of Shepherdsville, appellee, if she desired shelter, should have gone that way, and in any event she must have been exposed to the storm and rain in going to Shepherdsville, even if the freight train had not been where it was. Counsel, on this premise, argues conclusively that the case must be reversed, for several reasons. We cannot assent to such a proposition. We are of the opinion that appellee did not cease to be a passenger when she alighted from the train; but, on the contrary, was a passenger, and entitled to protection from the weather, in the depot of appellant, for a reasonable length of time to prepare to resume her journey. Being entitled as a passenger to the use of the depot for shelter, she was likewise entitled to an open and unobstructed way thereto, and especially is this true under such circumstances as were here presented.

The instructions given present the law more favorably to appellant than it was entitled to, as they, in effect, tell the jury that appellee must have sought shelter in Shepherdsville, when she had a right to shelter at the depot where she alighted. The instructions refused were properly so, for two reasons: First, they were erroneous and did not state the law; second, they were, in effect, given, and as given are more favorable to appellant than it was entitled to. We are also of the opinion that the instructions permitting punitive damages were properly given, as the facts proven in the case show that appellant was guilty of gross negligence in obstructing the way to the depot. Appellee had a right to alight from the train at the place provided for shelter for passengers, either to or from Shepherdsville; and, with this way obstructed, as it was shown to be, the practical effect was to put appellee off the train 200 yards from the depot in a storm. This it could not do. The verdict is not excessive, and is not flagrantly against the evidence.

Appellant also complains of the action of the trial court in giving to the jury an instruction authorizing punitive damages. This was not error. The conduct of the servants and employees on the train, if true, authorized an instruction on punitive damages.

Finding no error prejudicial to appellant, the judgment is affirmed, with damages.

JENKINS v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

Court of Appeals, Kentucky, November, 1898.

CARRIER AND PASSENGER—INJURED BY FALL OF PARTITION BETWEEN BERTHS IN SLEEPING CAR.—It was error to give to the jury a peremptory instruction to find for the defendants where it appeared that while the plaintiff was a passenger in a sleeping car the partition plank which separated his berth from the next one fell upon and injured him, though there was uncontradicted evidence that if the plank was securely fastened it could not fall, and the porter testified that it was so fastened, but no explanation was given as to the cause of the fall.

APPEAL from judgment, Circuit Court, Jefferson County, entered on verdict rendered by direction of court for defendants.

O'NEAL & PRYOR, W. B. DIXON and KOHN, BAIRD & SPINDLE, for appellant.

LYTTLETON COOKE, for appellee, Louisville and Nashville R. R. Co.
PHELPS & THUM, for appellee, Pullman Palace Car Co.

BURNAM, J. — Appellant brought this suit against the Louisville and Nashville Railroad Company and the Pullman Palace Car Company to recover damages for an injury alleged to have been sustained while he was a passenger on one of the railroad company's trains, and occupying a berth in the sleeping car of the Pullman Company. He had paid to the railroad company his fare from Nashville to Louisville, and had also paid for and been assigned a berth in a car of the Pullman Company; and he alleges that, while occupying his seat therein and leaning forward engaged in reading, he received a violent blow on the back of his head, caused by the falling of the headboard or partition plank, which separated the berth in which he was sitting from that in front of him, and that by reason of this blow his health and sight became permanently impaired, and that he has been compelled to incur large expense in trying to be cured from the effects of the injury, which he alleges was caused by the negligence and wrongful acts of the appellees. The railroad company in its answer denied every affirmative fact alleged in the petition; and further alleged that, if appellant received the injury complained of it was wholly in consequence of his own negligence and misconduct. The Pullman Company filed its separate answer, in which it denied all the affirmative averments of the petition; and further averred that, at the time of the alleged injury, it had furnished a suitable and proper car, which was provided with all the necessary and usual safeguards for the protection and comfort of its passengers; that the partition planks, or headboards, provided in the car, were adjusted and put in place after the usual and customary manner, and were provided with all the safeguards and protections known to the most skilful manufacturers of such cars and of such partition planks, or headboards; that it had also provided a competent and skilful employee to put the headboards or partition planks in place, and that at the time the accident is alleged to have occurred he had placed in its place, in the customary and proper manner, the headboard which is claimed to have fallen on the appellant; and that, if any injuries were received by the appellant from the falling of this headboard, they were received without negligence on its part. The pleadings being made up, and the case tried, at the conclusion of the testimony the circuit judge gave to the jury a peremptory instruction to find for the defendants, and judgment was entered accordingly, and we are asked on this appeal to reverse that judgment.

Upon the trial appellant testified that while he was sitting in the seat of the berth that had been assigned to him, leaning forward, reading, the partition plank, or headboard, which divided the berth

he occupied from the one in front of him, suddenly, and without previous warning, fell, and struck him on the head; that the blow knocked him down between the seats of the berth, and that the porter and the occupant of the berth directly opposite took the headboard off of him and replaced it; that as the immediate result of this blow on the head he experienced considerable pain and sickness of the stomach, which resulted in vomiting and quite a severe contusion; that when he arrived in Louisville on the next day he consulted with Dr. Skinner in regard to his injury, who examined him, and prescribed for him, after seeing him twice; that shortly afterwards he left Louisville, and went to Henderson, Ky., where he consulted Dr. Dickson, who examined him and treated him for the same injury; that as a result of the injury he has been compelled to abandon his profession as a dentist, and has experienced great suffering and permanent injury to his health. H. M. Tindel testifies that he had been sitting talking with appellant in his berth some time; that between nine and ten o'clock he retired to his berth, which was opposite that of appellant; that he left appellant sitting up reading a book, and that a short time after he had retired he heard the noise of something falling; that he looked across, and saw that the headboard between the berth occupied by appellant and the one immediately in front had fallen down, and was lying upon the back and head of appellant, who had been knocked down between the seats, on his hands and knees; that he called the porter, who came back from the front end of the car, and placed the board in its proper position; that he observed that the appellant was looking very pale, and that he complained of being sick at the stomach during the night. Dr. Skinner testifies that he saw appellant the next day in Louisville, and that his attention was called to a tender spot and a little swelling on the back of his head, and that he prescribed for him; that about ten days afterwards he saw appellant again, and that he looked sick and emaciated, and seemed quite feeble, and that he thought the injuries resulting from the blow had developed into a form of meningitis, permanently impairing appellant's health. And substantially the same testimony is given by Dr. Dickson, who treated him after his return to Henderson.

It is insisted for appellees that it is shown by the uncontradicted testimony of their carpenter and the porter of the sleeping car that these headboards were so constructed and were so fitted in place (there being grooves in the board which fit upon projecting beads on the stationary part of the car) as to make it a physical impossibility for it to fall out of place, after it had been once properly put in and fastened, and that the uncontradicted testimony of the porter is to

the effect that the board was not only placed properly, but was securely fastened; and it is further contended that, even if this board had fallen from its place, as claimed, it was a physical impossibility for it to have struck appellant as testified to by him; and that these physical facts present in the case are sufficient to overcome the evidence of the witnesses who testified for the appellant, and to justify the peremptory instruction given by the court. Even if it be conceded, from the testimony, that the mechanical contrivances for keeping this partition board in its place were the very best known and were sufficient for that purpose, still the question remains, was it actually so placed and secured by the catches? The only witness who testifies on this point is the porter, and he admits that the board had in some way gotten out of its place, and no explanation is given by the testimony as to how this occurred. It is suggested that it was the work of the appellant, and was a part of a scheme on his part to defraud appellee and the accident insurance company, but, at best, this theory is based only on conjecture. There is no testimony that appellant unfastened these locks, or in any way tampered with the headboard; and, when this is coupled with the testimony that the board did in some way get out of its proper place, to appellant's injury, a presumption arises, in the absence of other satisfactory proof, of negligence on the part of appellees, for which they are liable. See *Railroad Co. v. Smith*, 2 Duv. 556; *Cooley, Torts*, p. 663; *Ray, Neg. Imp. Duties (Pass. Carr.)*, p. 681; *Railroad Co. v. Walrath*, 38 Ohio St. 461; and *White v. Railroad Co.*, 144 Mass. 404, 11 N. E. Rep. 552. The rule has often been announced by this court that it is the province of the jury to determine the weight of evidence and the credibility of the witnesses, and that where the evidence conduces in any degree to establish a right of recovery it is error to give a peremptory instruction to find for defendant. See *Railroad Co. v. Howard's Adm'r*, 82 Ky. 212, and *Hammill v. Railroad Co.*, 93 Ky. 344, 20 S. W. Rep. 263. The testimony in this record is not of that conclusive and undisputed character where but one reasonable inference can be drawn from it, and the application to this case of the rules of law laid down for the guidance of courts in cases of conflicting testimony authorized its submission to the jury.

For the reasons indicated the judgment is reversed, with directions to grant the appellant a new trial, and for proceedings consistent with this opinion.

CONWAY v. NEW ORLEANS CITY AND LAKE RAILROAD COMPANY(1).

Supreme Court, Louisiana, December, 1898.

CARRIER AND PASSENGER — PLAINTIFF WALKING ALONGSIDE TRAIN AND STRUCK FROM BEHIND BY TROLLEY CAR ON NEXT TRACK. — 1. The West End passenger train of the defendant company came to its stopping place on Canal street, where it was when plaintiff walked up to the train, and turned to the right, in order to board the smoking car at the end of the train. An electric car of the defendant company ran on its track, which was near the steam train. The projection of the electric car and the projection of the steam train (towards each other) made very narrow the path upon which plaintiff was walking, with his back to the electric car, by which he was knocked down, and greatly injured. The rule as to looking and listening had no application. About midday, defendant's motorman did not see plaintiff, who was walking in front, in a dangerous position, because of his advancing car. It was his duty to keep a sharp lookout, and see pedestrians at the place on their way to board the cars. No gong was sounded, and no alarm.

2. There was no proper care on the part of the employee in charge of defendant's electric car. Such care and diligence must be exercised at dangerous places on a railway, to avoid inflicting injury, as the proper manning of a car requires.

(Syllabus by the Court.)

APPEAL from a judgment of Civil District Court, Parish of Orleans, in favor of plaintiff.

DENÉGRE, BLAIR & DENÉGRE, for appellant.

WALTER H. ROGERS and **GEORGE S. DODDS**, for appellee.

BREAUX, J. — This was an action to recover damages for the loss of plaintiff's leg. The defense pleaded the general denial and negligence of plaintiff. On the day the accident occurred, being All Saints' Day, many persons were visiting the cemeteries. Plaintiff, about noon, repaired to Canal street, intending to go to the cemeteries. He left the corner of Baronne street, and walked towards the first coach of the defendant's steam train. Only two witnesses saw the accident, — the plaintiff himself, and one of the witnesses of the defendant. The plaintiff testified, as just stated, that he left the corner of Baronne street, and walked to the first coach, and inquired of the conductor of the Lake steam train, how long it would be before it started. "Ten minutes," was the answer, whereupon

1. Rehearing denied January 23, 1899.

plaintiff said, "I will go with you," and walked along the side of the cars near the train, a distance of about 150 feet, towards the river, for the purpose of boarding a "smoker" car, when he was struck on the right side and was knocked down by an electric car of the defendant, and his leg crushed by one of the front wheels, rendering amputation necessary. The steam car he was about to board stands between Baronne and Carondelet streets on the neutral ground, and he was walking between the tracks near the Lake train. His back was towards the car that struck him. The plaintiff also stated that on turning to his right to walk a distance along the train, between the tracks, as before noted, he looked towards the cemeteries, to see if any car was coming on the track near the steam train he was about to board, but that when he walked on the neutral ground on the side of the train he did not keep a lookout, for the reason that he was not walking on the track of an incoming car. A rough sketch of the place shows that the track over which the plaintiff walked measured four and one-half feet, and that the projecting sides of the steam train and electric cars, when opposite one another, measured eighteen inches. The defendant controverts plaintiff's contention regarding its depot, and avers that the neutral ground is not private property; that it has no control over it. The facts, as relate to defendant's case, as testified to by defendant's witness, who, with the plaintiff himself, are the only witnesses who were present when the accident occurred, are, in substance, that the injury was caused by plaintiff attempting to recross the track in front of an incoming car immediately after he had crossed it untouched. In support of the testimony of its witness, defendant's counsel referred to the evidence showing that on the day the accident occurred, owing to the large number of persons going to or returning from the cemeteries, there were many cars (100 per hour, it was said) due at a given point on the track (*i. e.*, one car every thirty-six seconds), and that, in the nature of things, the plaintiff, in an ordinary walk, would have been struck by some other car ahead of the one which injured him. The defendant offered the testimony of plaintiff in the recorder's court, taken a comparatively short time after the accident, in a case brought there to hold the motorman responsible in a criminal action, for the purpose of proving the contradictory statements of the plaintiff on a vital point of the case. The evidence of record also shows that defendant's cars were located on Canal street, by the city engineer, with the approval of the city authorities. The case was heard by a jury. Their verdict was for \$8,500 in favor of plaintiff. From the verdict and judgment defendant prosecutes the appeal.

We have seen that only two witnesses testified as to how the accident happened, — the plaintiff, and one of the defendant's witnesses. They greatly differ in their account. The first question for our determination is as to which state of facts is correct. The jury must have found, in order to return their verdict, and the trial judge in signing the judgment, that plaintiff was walking along the car on his way to the smoking car when he was struck. They heard the testimony, and had the opportunity personally, while the witnesses were in their presence, to judge of their credibility. We are inclined to accept their theory as correct, not only because of the verdict, but because, in reading the testimony of the witnesses, the verdict appeared to us to have been correctly returned to the extent stated in our decree. He (witness for defendant) does not appear to us as having been, as relates to the accident, a very close and careful observer. For instance, he testified that the cars of defendant — the steam dummy — on one track and the electric car on the other were four or five feet apart when standing together or when passing each other at the place where the accident occurred, while, in fact, the space between the cars was eighteen inches; nor did he see the plaintiff at the very moment he was struck by the car, but he stated he thought that he was struck by the step of the car. In our view, the parts of the body wounded, as shown by the testimony of physicians by whom plaintiff was attended, are not corroborative of the statement. While we have no reason to question the sincerity of the witness, his testimony, given in a language in which he was not very conversant (English was not his mother tongue), has not impressed us to the extent needful to set aside, on this point, the jury's verdict. The great number of moving trains on the day the accident occurred, and the time-table of the defendant company, do not, in our judgment, do away with plaintiff's absolute statement, in substance, that no other car passed him while he was walking over the 150 feet of ground along the dummy to the smoking car.

This brings us to the question of the contributory negligence *et non* of plaintiff. We take it that the statement of plaintiff that he did not keep a lookout when he went along the neutral ground, and walked down the side of the train to board it, is free from error; that the plaintiff had surely walked a distance of about 150 feet without turning to see if there was an approaching car on the track to his right as he was walking. We have given most careful attention to the case from that point of view. Plaintiff did not, at the moment, suspect the threatening danger. He admits, had he looked, he would have had no trouble in seeing the car approaching him.

There was forgetfulness, it is true, on his part, just prior to the accident, in his listlessly walking, as he did. Whether it was enough to defeat his right of recovery is a question to be hereafter determined. Even if one should usually "look and listen," yet, if the servant or agent should have seen the danger, it is negligence not to have seen it, and applied himself, as far as possible, to avoid the accident. (Moreover, the plaintiff was on the passageway from which passengers board the train. These reasons, we think, take the case out of the rule requiring one "to look and listen.")

We take up for consideration the question of the negligence of the motorman in charge of the car which struck plaintiff. He was at the time looking towards the river, right ahead, he says, and did not see the plaintiff at all, before he heard some one hallooing, whereupon he looked to the north side of his car, and saw plaintiff, who had been knocked down, lying under the car. Not to have seen this old gentleman, the plaintiff, on a clear day, walking in so dangerous a place, was culpable negligence. It must be borne in mind that passengers were invited to board the train from the space over which plaintiff was walking at the time. It devolved upon the employees of the defendant company to be careful, to run slowly, at this place, and to look on the entire front of the advancing car, and to exert a timely care towards protecting persons in dangerous proximity to the car. The space having been reduced, as we have already seen, by defendant's cars, from four and one-half feet to eighteen inches, it devolved upon its employees to be careful and watchful. It does seem that with ordinary prudence and watchfulness the plaintiff would have been seen by the one in charge of the advancing car. Not to have seen him, in our judgment, makes it evident that there was a want of even ordinary care. If the employee had exercised the care required, the accident might have been avoided. It certainly devolved upon defendant's agents to carefully look. Any other rule would afford scant protection to the public, and would give protection to indifference where there should be watchfulness. There can be no serious objection to the nearness of the tracks to each other. It is unavoidable, none the less, if a proximate track gives rise to more than ordinary danger; such danger should be met by corresponding precaution. Instead of care and caution which should have been exercised in passing the steam train, the record reveals that the motorman never saw plaintiff, who was walking in a dangerous path between the cars; that there was no sounding of the gong, nor the least warning of approaching danger. The defendant and its employees upon such an occasion, particularly when there were many passengers and a

number of persons on the street, owed to the public reasonable care and diligence. It was the duty of this motorman to be on the constant lookout when passing the narrow strip between his car and the West End steam train, the stopping place of the latter. The time, about midday in November; the place, a dangerous way, where passengers frequently boarded the train which the plaintiff was seeking to board; the duty to be on the lookout, and give warning when there was danger of accidents, — all made it obligatory upon defendant's motorman to be on the alert. By the use of ordinary care, might not the defendant have known that plaintiff was in an exposed position, which rendered it proper to give warning, and even, at this particular place, check its car a little? In our judgment, there was not sufficient care and caution taken to avoid the accident, and, in consequence, we think that the defendant is liable. Plaintiff, it is true, was in an exposed position, which called for more than ordinary prudence in his movements, yet he was invited to the place where the accident occurred, and, notwithstanding a slight inattention, he should not have been subject to the risk of severe injury by the negligence of the motorman. The plaintiff had the right to assume, when about to step on the train, that he would not be injured by another, an incoming car of the defendant.

The amount of the damages presents the next question before us for determination. In our judgment, it should be less than the amount found by the jury, in order to bring it within the rule which generally governs in fixing damages. We have, as relates to damages, given due weight to all the facts of the case, and we think that under the circumstances and under our jurisprudence the amount should be reduced to \$6,000. For reasons assigned it is ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount of the verdict and judgment herein rendered in favor of the plaintiff from \$8,500 to \$6,000, with interest from date of the decree in the lower court on the amount just stated.

**PIKESVILLE, REISTERTOWN AND EMORY GROVE
RAILROAD COMPANY OF BALTIMORE COUNTY
V. STATE (FOR USE OF RUSSELL.)**

Court of Appeals, Maryland, December, 1898.

**MASTER AND SERVANT — CONDUCTOR KILLED BY STRIKING POLE
WHILE COLLECTING FARES.** — It cannot be said that a conductor
assumed the risk incident to his employment where it appeared that he had

been over the road but twice; that no instruction had been given to him, and that while collecting fares from the footboard of a summer car, he was struck and killed by a pole supporting the trolley wire, and that was several inches nearer the car than others along the line, but such difference in position was not apparent.

COLLECTING FARES ON SIDE OF CAR NEXT POLES. — Not having been directed on which side of the car to collect fares he was not guilty of contributory negligence in attempting to collect them on the side next to the poles.

APPEAL from judgment, Superior Court of Baltimore City, in favor of plaintiff.

THOMAS R. CLENDINEN and WILLIAM L. MARBURY, for appellant.

RICHARD B. TIPPET, JAMES E. TIPPET, and WILLIAM S. BANSEMER, for appellee.

PAGE, J. — This suit was brought by the appellee, for the use of the father and mother of James E. Russell, whose death it is alleged was caused by the negligence of the appellant. Russell entered the service of the appellant on the 18th day of May, as a conductor on one of its cars, and on the same day, while attending to his duties, was killed by being struck by one of the poles that supported the overhead wires. The route of the car to which the deceased had been assigned was from Owings Mills to Emory Grove. Russell had already made two trips before the accident happened. The structure of the appellant consists of a roadway with a single track, alongside of which the poles are stationed. The car was an open summer car, with seats running entirely across, and a footboard on each side, used as a step for persons entering the car, and as a means for the conductor to pass from one end to the other. The footboard projects fifteen inches beyond the rail. The pole which struck the deceased was No. 300, located two feet one inch from the track. The distance of other poles from the track, as measured, was: No. 301, two feet eight inches; No. 302, two feet seven and one-half inches; No. 303, two feet nine inches; No. 299, two feet four and one-half inches; and No. 298, two feet eight inches. From the place of the accident the road is straight each way for 350 feet, and there are no obstructions, natural or other, to prevent pole No. 300 from being placed further from the track and in line with the other poles. When the car reached the Hannah Moore Academy the motorman nodded his head to the conductor that they had come to the place where he could begin to take up fares. There were several such points, and the motorman had been instructed to tell Russell, who was a new man, where those points were. Russell was to take up the fares anywhere before reaching the next section.

When Russell caught the motorman's nod, he stepped onto the footboard from the rear platform, on the side next to the poles, swung himself along the side of the car, holding to the handles, until he came opposite to a bench whereon were seated Mr. and Mrs. Logsden, two of the passengers, who had boarded the car near Hannah Moore Academy. Mrs. Logsden was seated about midway the bench, and was nearer to the side where the deceased was than her husband. When he came opposite this bench he stopped, turned towards them, and, slightly inclining his body into the car, reached forward his hand for the fares. It was then that he was struck by pole No. 300. His head was driven violently against the handle of the car, and he received a fatal injury. There was evidence tending to prove that if pole No. 300 had been the same distance from the track that the others were he would have escaped injury, and that the proximity of that pole rendered it unsafe to collect fares on that side of the car; and that the roadway on the other side, at that point and for some distance, was incumbered with fences, trees, and a telephone pole, so as to make it unsafe to collect fares from that footboard. There was evidence on the part of the defendant tending to prove this was not correct, — that there were no serious obstructions; that it was dangerous all along the road to collect fares on the pole side; that the witness Tracy saw the danger from pole No. 300 before it was reached, and tried to warn the conductor, and there was nothing to prevent Russell from seeing it also. No instructions were given the conductor except such as he received from the motorman as to the places where the fares were to be collected. Russell was a steady man, but unused to the trolley in the country, having had experience only as a conductor on a cable car in the city. A little while before the accident the motorman had said to him, "You are a good, steady man, and you had best be careful; if one of these poles catches you, it will fix you," and Russell had replied "he hoped not." Russell was a "stoutish-built man, full stomach, weighing about one hundred and seventy pounds." At the time of the accident the "car was going nearly as fast as possible."

Three exceptions were taken at the trial, but the first two were not insisted upon at the argument. The third and fourth exceptions bring into question the action of the court upon the prayers offered by the respective parties, in granting the plaintiff's first and fifth, and rejecting the second, third, fourth, fifth, sixth, ninth, tenth, thirteenth, fourteenth, and fifteenth of the defendant, and also the defendant's, offered at the conclusion of the plaintiff's evidence.

There can be but little doubt about the general principles applicable to cases of this kind. When a servant agrees to occupy the place prepared for him by the master, he assumes all the usual risks of the service, and also of all those perils that are known to him or ought to be known to him by the exercise of ordinary watchfulness. On the other hand, it is the duty of the master to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities; and he must not expose his employees to risks beyond those which are incident to the employment, and even in contemplation at the time of the contract of service; and the servant or employee has a right to presume that the master has discharged these duties. *Stricker's Case*, 51 Md. 47; *Baker's Case*, 84 Md. 21, 35 Atl. Rep. 10; 3 Elliott, R. R. secs. 1288-1291, and authorities cited. Russell, therefore, in accepting the employment of the appellant as conductor, took upon himself all such risks as were usually incident to the service, and also such other risks as were known to him or were discernible by ordinary care on his part. He was obliged to observe and guard himself against danger from the poles as properly or apparently located. But one or more of them had been negligently and improperly placed, so that thereby usual risks of the service were increased; and if such misplacement was not apparent to him with the exercise of reasonable care, and was not in fact known to him, he was under no obligation to protect himself against such increased risk. In such case the increased danger would be hidden and secret, and no rule of law demands that one shall look out for what he has no reason to anticipate. *Gies' Case*, 31 Md. 366; *Lewis' Case*, 38 Md. 600. Now there was evidence going to show that poles such as these are usually placed in line, and that the poles along this road apparently were so placed, and the apparent distance was about two feet eight inches from the track. One of the poles, No. 300, was seven inches closer, and for the increased risk consequent therefrom the deceased was not bound to look out, unless he knew of the location of the pole, or ought reasonably to have known it, or unless it was obvious. It was contended that Russell, as matter of law, was guilty of contributory negligence in attempting to collect fares on the side next to the poles. His duty was to collect fares, and he was not directed on which side of the car he was to do it. He was a new man, and knew of no rules on the subject, and was not informed there were any. If, therefore, he chose to collect the fares on the pole side, for any reason, his obligations as to taking care of himself were not thereby enhanced. He was bound in any case to look out for the poles as they ought to have been and apparently were located, but

the use of the pole side of the car did not impose upon him the duty of knowing what he did not and could not reasonably know. If he did not know of the misplaced pole and the increased risk growing out of its misplacement, there was no reason why he should not collect fares on the pole side, so long as he was careful to protect himself from all the apparent danger he incurred in so doing.

The evidence touching the several matters of fact that we have adverted to is in some particulars conflicting. There was evidence that pole 300 was within the danger line, that fares could be collected safely except as to the special pole, and that the road was so obstructed on the other side of the car as to make it unsafe to collect from that side. On the other hand, the appellant offered evidence contradicting these matters and tending to show that the situation of the pole was obvious, and that the deceased should have observed it. In all such cases the question of the negligence of the parties should be submitted to the jury, for them to determine from all the facts offered in evidence whether either or both of the parties had been guilty of negligence, in consequence of which the accident happened. *Maugans' Case*, 61 Md. 60 (1).

The first prayer of the plaintiff instructed the jury substantially that if they found that pole 300 was in an unsafe position, and that the deceased was killed in consequence thereof, and that he was ignorant of its dangerous position, and could not have known it by the use of ordinary care and caution on his part, and that at the time of the injury the deceased was using due and ordinary care and caution, they must bring in their verdict for the plaintiff. This prayer properly presented the case to the jury, and the court committed no error in granting it. It would be profitless for us to examine in detail all the rejected prayers of the defendant. What has been said already is applicable to them all, except to those that go to the question of damages. As to them, we are of opinion the principles laid down in *Mahone's Case*, 63 Md. 146, are applicable, and are so fully stated there as not to require any additional remarks from us here.

The judgment must therefore be affirmed.

1. *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53, 60, is reported in 3 AM. NEG. CAS. 648.

MEEHAN v. SPIERS MANUFACTURING COMPANY.

Supreme Judicial Court, Massachusetts, January, 1899.

FELLOW-SERVANTS — MASTER NOT LIABLE FOR ACT OF SUPERINTENDENT. — The act of a superintendent in ordering the use of naphtha to clean a tank was that of a fellow-servant of one who was holding a lamp for those doing the cleaning, and who was injured from an explosion caused by the fumes of the naphtha reaching the flame of the lamp where it did not appear that the naphtha had been provided by the master for the purpose of cleaning the tank.

FROM a judgment of Superior Court, Worcester County, in favor of defendant, plaintiff brings exceptions.

WM. A. GILE and F. B. KELLY, for plaintiff.

H. PARKER and C. C. MILTON, for defendant.

BARKER, J. — The action is at common law, with the burden upon the plaintiff to show that the negligence from which he suffered was negligence for which his employer was answerable. This burden is not met by evidence which is equally consistent with actionable fault of the employer and with the absence of such fault. At common law a superintendent is for many purposes a fellow-servant with the workmen under him, and the employer not answerable to them in case of the superintendent's negligence, even in giving an order.

The plaintiff must go further, and show that the negligence of a superintendent was in a matter as to which the law imputes his carelessness to the master. Upon the evidence, the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used. The accident was caused by using naphtha upon cotton waste in cleaning the inside of a tank, when the fumes of the naphtha were liable to explode upon contact with the flame of a lamp with which the plaintiff standing near by was giving light for their work to men who were within the tank using there the waste and naphtha. The naphtha was used in obedience to an order given by the superintendent. But it did not appear that the naphtha was provided for use in cleaning the tank. It had been used, and, we must assume, properly used, for cleaning machines; and the only fair inference from the plaintiff's testimony is that other and safe materials had been used theretofore in cleaning the tank. It was as reasonable to find from the evidence that

the superintendent's act in ordering naphtha to be used on this occasion was merely his own choice between safe materials which he might have directed to be used, and dangerous materials, provided for some other, but proper, purpose, for which choice his employer was not answerable, as to find that in giving the order he was carrying out an intention of his employer to have naphtha used in cleaning the tank.

Exceptions overruled.

HARDMAN V. WHOLLEY.

Supreme Judicial Court, Massachusetts, January, 1899.

ANIMALS — KICKED BY HORSE STANDING PARTIALLY ON SIDEWALK. — The owner of a horse that was standing partially on a sidewalk, where it had been hitched to feed, is liable to a pedestrian who, as he approached the horse, was kicked by it though there was no proof that the horse was vicious, but there was proof that the horse had been made nervous by ill treatment of the driver (1).

FROM a judgment of Superior Court, Essex County, in favor of plaintiff, defendant brings exceptions.

A. P. WHITE and H. S. STEARNS, for plaintiff.

T. W. COAKLEY and F. J. KELEHER, for defendant

HOLMES, J. — This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched, and were feeding out of feed bags attached to their heads. There was evidence that this horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached, suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is

1. For actions relating to injuries caused by ANIMALS, arranged in alphabetical order of States, from the earliest period to 1896, see 1 AM. NEG. CAS. 1-436. For subsequent actions, see vols. 1-4, AM. NEG. REP. and the current numbers of that series.

a trespasser, and kicks another, the kick will enhance the damages, without proof that the animal was vicious, and that the owner knew it. *Lee v. Riley*, 18 C. B. (N. S.) 722 (1). See *Lyons v. Merrick*, 105 Mass. 71, 76 (2). So, in this commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious. *Barnes v. Chapin*, 4 Allen, 444 (3); *Marsland v. Murray*, 148 Mass. 91, 18 N. E. Rep. 680 (4); *Dickson v. McCoy*, 39 N. Y. 400, 401 (5). See *Cox v. Burbridge*, 13 C. B. (N. S.) 430 (6). The same law naturally would be applied to a horse upon a sidewalk, where it ought not to be (see *Mercer v. Corbin*, 117 Ind. 450, 454, 20 N. E. Rep. 132); and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment.

Exceptions overruled.

CARLSON V. LYNN AND BOSTON RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January, 1899.

STREET RAILWAYS—STRUCK BY CAR WHILE WALKING BESIDE TRACK.—Evidence of due care on the part of the plaintiff was shown where it appeared that he was walking, on a dark, stormy night, on a path beside a track when struck by a car between which and a fence next the

1. In *Lee v. Riley*, 18 C. B. N. S. 722, it appeared that through the defect of a gate which the defendant was bound to repair, his horse got out of the defendant's farm into an occupation road and strayed into the plaintiff's field, where it kicked his horse: *Held*, that the defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove that his horse was vicious and that he was aware thereof. *Held*, also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable.

2. *Lyons v. Merrick*, 105 Mass. 71, is reported in 1 Am. Neg. Cas. 304.

3. *Barnes v. Chapin*, 4 Allen, 444, is reported in 1 Am. Neg. Cas. 310.

4. *Marsland v. Murray*, 148 Mass. 91, is reported in 1 Am. Neg. Cas. 310.

5. *Dickson v. McCoy*, 39 N. Y. 400, is reported in 1 Am. Neg. Cas. 321.

6. In *Cox v. Burbridge*, 13 C. B. N. S. 430, an action to recover for injury sustained from being kicked by a horse, it appeared that defendant's horse, being on a highway, kicked the plaintiff, a child, who was playing there. No evidence was submitted to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick. *Held*, that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence.

path there was a space of only twenty inches; that the path was intended for pedestrians and was the only one along the highway; that the track crossed over from the opposite side of the highway about 700 feet from the point where he was struck; that he had listened for cars and had turned and looked back twice within 700 feet and had seen nothing and the car was traveling at the rate of twenty miles an hour and had only a small kerosene lamp for a headlight.

FROM a judgment of Superior Court, Essex County, in favor of plaintiff, defendant brings exceptions.

FRANK D. ALLEN, for plaintiff.

WALTER I. BADGER, for defendant.

FIELD, Ch. J. — The single exception is to the refusal of the presiding justice to rule that the plaintiff could not recover. The counsel for the defendant, in his argument before this court, concedes that the evidence warranted the jury in finding negligence on the part of the defendant, but he contends that there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. There was evidence that the plaintiff was walking in the only path or walk in the highway which was intended for travelers on foot, and which it was customary for people to walk in; that the night was dark, the road muddy, and the wind blowing from the sea in his face as he walked along; that the plaintiff listened to hear if anything was coming, and heard nothing, and within a distance of less than 700 feet turned around twice and looked to see if anything was coming, and saw nothing; that when he was hit by the car he was from 200 to 300 feet beyond the place where he last looked. The track of the defendant, at the point where the plaintiff was injured, was on the right-hand side of the highway in going from Chelsea to Lynn. On the right-hand side of the track was the path for foot travelers, and on the right-hand side of the path was a wooden fence. Between the side of a passing car and the fence, at the place where the plaintiff was injured, was a space of about twenty inches. The car was going from twenty to twenty-five miles an hour. There was evidence that the headlight of the car was a small kerosene lamp; that the highway was not lighted; that the crossover of the track from the left to the right-hand side of the highway was about 670 to 680 feet before the place where the plaintiff was injured. The car, after it hit the plaintiff, went a considerable distance beyond — estimated from seventy-five to one hundred and twenty feet — before it was stopped. There was evidence that almost up to the time of the accident the motor-man was facing to the left-hand side of the highway, and not to the

right. The evidence of the plaintiff's conduct, testified to by himself and by his companion, Keeney, seems to us evidence of due care on his part. The speed and manner in which the evidence showed that the car was run, on a dark night, on a track so near to the path for foot travelers, made traveling on the path, under the circumstances shown, dangerous for even careful persons.

Exceptions overruled.

SPADE V. LYNN AND BOSTON RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January, 1899.

CARRIER AND PASSENGER — ASSAULT. — A carrier is not liable to a passenger who was injured by another passenger being thrown against her, in the effort of the conductor, acting in due care, to remove a drunken passenger from the car (1).

DAMAGES — FRIGHT. — If there was negligence in removing the drunken man and the carrier was liable, it was liable only for the consequences of the injury, and not for fright from the drunken man's presence or the attempt to put him off.

PASSENGER'S INFIRMITIES KNOWN TO CONDUCTOR.—A carrier's obligations to a passenger are not increased by the knowledge of the conductor of the passenger's infirmities, but if guilty of an assault the carrier cannot cut down her damages by showing that the effect would have been less upon a normal person.

FROM a judgment for plaintiff, Superior Court, Suffolk County, defendant brings exceptions.

S. L. WHIPPLE and W. R. SEARS, for plaintiff.

C. K. COBB, for defendant.

HOLMES, J. — This is an action for personal injuries, which already has been before the court. 168 Mass. 285, 2 Am. Neg. Rep. 566, 47 N. E. Rep. 88. At the second trial the evidence was that the defendant's conductor, in removing a drunken man from a car, jostled another drunken man, who was standing in front of the plaintiff, and threw him upon her. The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that

1. For actions relating to ASSAULTS UPON AND EJECTION OF PASSENGERS, ETC., from the earliest period to 1896, see vol. 8, AM. NEG. CAS., where the same are classified according to States.

For subsequent actions in the State and Federal courts, see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen, when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders. *Gilbert v. Stone*, Aleyn, 35, Style, 72; *Scott v. Shepherd*, 2 W. Bl. 892, 896 (1); *Cooley*, Torts, p. 115. See *McLeod v. Jones*, 105 Mass. 403, 405; *Miller v. Horton*, 152 Mass.

1. The facts in *Scott v. Shepherd*, 2 W. Bl. 892, 1 Smith's Leading Cas. (9th ed.) 737, commonly called the "Squib Case," are as follows: Trespass and assault for throwing, casting and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes that he lost the sight of it. Plea, not guilty. Tried at Bridgewater Assizes. Verdict for plaintiff with £100 damages, subject to opinion of court on the case. On the evening of the fair day at Milbourne Port, October 28, 1770, the defendant threw a lighted squib, made of gunpowder, etc., from the street into the market house, which was a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one

Yates, who sold gingerbread, etc. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing and then threw it across the said market house, when it fell upon another standing there of one Royal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market house, and in so throwing it struck the plaintiff, then in the said market house, in the face therewith, and the combustible matter, then bursting, put out one of the plaintiff's eyes. *Held*, that trespass and assault will lie for originally throwing a squib which, after having been thrown about in self-defense by other persons, at last put out the plaintiff's eye.

540, 547, 26 N. E. Rep. 100; *Pierce v. Steamship Co.*, 153 Mass. 87, 90, 26 N. E. Rep. 415; *Whalley v. Railway Co.*, 13 Q. B. Div. 131 (1). And compare the rule as to duress in contracts and conveyances. *Fairbanks v. Snow*, 145 Mass. 153, 155, 13 N. E. Rep. 596. On the other hand, the contrary has been intimated in a case of shooting in self-defense, the injury to the third person being treated on the footing of accident. *Morris v. Platt*, 32 Conn. 75, 84. See Bac. Max. Reg. 5, 6; Addison, *Torts* (6th ed.), 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way. See *Taylor v. Inhabitants of Plymouth*, 8 Metc. (Mass.) 462, 465; *Print Works v. Lawrence*, 23 N. J. Law, 590, 613. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy. *Rex v. Commissioners*, 8 Barn. & C. 355; *Nield v. Railway Co.*, L. R. 10 Exch. 4 (2). Compare *Whalley v. Railway Co.*, 13 Q. B. Div. 131, *supra*. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect

1. In *Whalley v. Lancashire and Yorkshire Railway Company*, 13 L. R. Q. B. Div. 131, it appeared that by reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendant's railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater ex-

tent than it would have done had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently; *held*, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.

2. The facts in *Nield v. London and North Western Railway Company*, 10 L. R. Exch. 4, were: The owners of

of the construction and management of their vehicles, but, if that care is shown, probably the injury must be regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunken man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person, and not for such mental disturbance and injury as was caused by other acts of the conductor, and the general disturbance in the car. This was refused, and the jury were instructed that if there was a physical injury, and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became, or might be found, liable for all the consequences of the disturbance in the car, and of the plaintiff's fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery; and it is for the consequences of the battery only that the defendant is liable, not for all the consequences of the drunken man's presence in the car, or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating.

a canal, being threatened by an overflow of flood water from a neighboring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal,

above the premises of the owners of the canal, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action to recover damages for the injury so caused: *Held*, that the owners of the canal were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural water-course, not to impede the flow of water down it.

But it seems quite possible in this case that the plaintiff's trouble was due, in substance, to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark, without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter finding.

We may add a word with reference to a suggestion made on behalf of the plaintiff, and having some bearing upon the eighth instruction asked, and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person, and that the conductor must have known it. We regard such an argument, even to the jury, as wholly inadmissible. Ordinary street cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it was left to the jury to say whether there was anything that called for special attention to the plaintiff, beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation, except the conductor's acquaintance with the plaintiff, and that laid no foundation for it. We should add, however, to avoid being misunderstood, and with reference to the plaintiff's tenth request, that, if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person. *Braithwaite v. Hall*, 168 Mass. 38, 40, 1 Am. Neg. Rep. 623, 46 N. E. Rep. 398. The measure of the defendant's duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another.

Exceptions sustained.

DETZUR v. B. STROH BREWING COMPANY.

Supreme Court, Michigan, January, 1899.

PEDESTRIAN INJURED BY FALL OF GLASS FROM BROKEN WINDOW PANE IN BUILDING. — The question of negligence was properly left to the jury where it was shown that the owner of a building left glass in a broken condition in a window fifty or sixty feet above the sidewalk and a pedestrian was struck by a piece that fell to the walk on a pleasant day when there was but little wind.

PROXIMATE CAUSE — WIND. — A wind which pressed broken glass from a window and caused injury to a pedestrian cannot be said to have been the proximate cause of the accident, and the broken glass the remote cause.

EVIDENCE. — The admission of the opinion of a witness as to the safety of a broken window glass above a sidewalk was improper, as that question was for the jury, who were to draw the conclusions, not the witness.

EVIDENCE — PRACTICE. — Unless an objection to the admission of evidence clearly advises the trial court of the specific ground upon which it is made, it will not justify a reversal.

DAMAGES. — Three thousand five hundred dollars is not excessive damages for a stiff arm.

REMITTITUR — NEW TRIAL — DISCRETION OF COURT. — The action of the trial court in making a new trial dependent upon a refusal to remit a portion of the verdict was in the discretion of the court, and no error was committed where the amount of unliquidated damages was the only question involved.

FROM a judgment of Circuit Court, Wayne County, in favor of plaintiff, defendant brings error.

HENRY M. DUFFIELD (THOMAS S. JEROME, of counsel), for appellant.

JAMES H. POUND, for appellee.

HOOKE, J. — The plaintiff was injured by a piece of glass, which fell from a window of the defendant's building, cutting her arm severely, and permanently impairing its use, according to some of the testimony in the case. There is testimony upon the part of the plaintiff tending to show that a round window in the upper story was broken for some days or weeks before the accident, and that it was a piece of glass from this window which injured the plaintiff. The defendant offered testimony tending to show that there was no broken window in the building on the day before the accident, and that the glass causing the injury came from a square window, in a lower story, and its fall was caused by a high wind blowing at the time. The theory of the only count relied upon is that the defendant created and maintained a nuisance, in an insecurely fastened and broken window sash and glass, whereby the plaintiff was injured. A verdict of \$10,000 was rendered in behalf of the plaintiff. A motion being made for a new trial, the court denied the same, upon condition that the plaintiff remit the sum of \$6,500 from the verdict, which was done. The defendant has brought error.

Error was assigned upon the refusal of the court to charge the jury that there was no evidence of negligence. It is urged that it cannot be inferred from the mere fact that there was an accident. There is testimony tending to prove that there was a broken window; that, immediately before the accident, a window or glass was heard

rattling, and the witness looked up, and saw triangular pieces of glass falling from the window which she had previously seen in a broken condition; that several pieces fell to the sidewalk; and that it was a pleasant day, with but little wind. The window was fifty or sixty feet from the ground, in a building that stood but a few feet from the street. If it is true that a pane of glass was shivered, as, we think, there was some testimony tending to show, we cannot say that a jury could not legitimately find that it was negligence to leave it in that condition until the action of the elements loosened it, and caused it to fall. It is true that, where there is no evidence suggestive of a negligent cause no recovery should be allowed upon a charge of negligence, but this is not such a case. Circumstances consistent with the plaintiff's theory are found in the case, and offer a reasonable opportunity for the inference that the injury resulted from a careless disregard of the broken and loosened condition of glass in a window, above a street, where pedestrians were frequently passing.

Counsel say that it is common knowledge that there is nothing dangerous in itself in a broken windowpane. We know that it is common to see cracked and broken windows, and we recognize the fact that some of them are considered safe; but others are sometimes seen which are so palpably unsafe, because of the apparent danger of the pieces falling or being shaken out when the sash is shaken by wind, or otherwise, that they may well be considered dangerous. As we cannot say that all cracked windows are safe, we must submit the question to the jury, when the testimony tends to show a condition of the window indicating danger.

In this connection we will mention the question of proximate cause. Counsel contend that, if the glass fell by means of its being dislodged by the wind, the negligence of the defendant was not the proximate cause of the injury, and they complain of a refusal to instruct the jury that in such event the plaintiff should not be allowed to recover. The negligence complained of is the maintenance of a window in such a condition that the glass was liable to fall out, not necessarily from its own weight, but under the natural conditions and strain to which it was likely to be subjected. It might not be negligent to leave a broken pane, if assurance could be given that it would be undisturbed by wind or by use. But wind is an every-day occurrence. It is a condition, not necessarily a cause, and one which should be taken into consideration before determining that a broken glass is not likely to fall. The wind may have been a concurring circumstance, but it cannot be said to have been the proximate cause, and the broken glass the remote cause.

It cannot be true that a defendant who is liable if a defective glass falls from its own weight on a quiet day is to be relieved from responsibility because its fall is due to the pressure of a wind which should have been anticipated.

The testimony of two witnesses was relied upon to prove that a round window in the upper story had been broken for some time. One of these witnesses testified that she had noticed the window before; that it had a hole in it, etc.; she had noticed the rattling of these panes. She was then asked: "Q. Will you state as to whether or not, before this, when you would hear this rattling, whether you thought that was a safe window or not? A. No, sir." The testimony was inadmissible. If we overlook the fact that the question did not ask her to state her opinion upon oath, but called merely for a previously existing opinion, and assume that she meant to give it as her opinion at the time of the trial that the glass was unsafe, such testimony was incompetent. It was proper for her to state the condition of the window, and the circumstances which came under her observation; but it was for the jury to draw inferences and conclusions, as to danger or safety. The condition of this window as to safety was one of the principal points in the case. Upon the unsafe condition of this window the case may be said to have hinged. Analogous questions have been passed upon repeatedly by us, as shown by the cases cited in the brief of counsel. But the objection now urged was not made, and it is fair to presume that the trial court did not consider it. The reason given for the objection was that she was not shown to be an expert. The court probably considered it a matter requiring no special qualification, and in this he was right; and we can hardly believe that he would have admitted the testimony had the objection been made which was made in this court.

Again, error is assigned upon a hypothetical question asked a medical expert. The objection appearing upon the record is that it was incompetent, which did not advise the court that the form of the question was objectionable. The precise point argued here is that the question made the witness' understanding of the testimony of another witness a part of the question, — a practice which has been criticised by this court, though permitted in some States. See *People v. Aiken*, 66 Mich. 476, 33 N. W. Rep. 821; *Kempsey v. McGinniss*, 21 Mich. 137; *Lawson, Exp. Ev.*, p. 144 *et seq.*

Error is also assigned upon the introduction of admissions of Bernard Stroh, the president of the company, who is said to have stated to the plaintiff's mother, in an interview some hours after the accident, that the windows were defective. Objections were

made to the questions, but no ground whatever was stated, in two instances. A third objection to this testimony is based upon the ground of incompetency. While there may be cases in which a court could not fail to understand the point relied upon, even under so general an objection as incompetency, there are others where such an objection would not even suggest the real objection. In this case it might have been intended to mean that the president had no authority to negotiate a settlement, or that he was not engaged in a negotiation for that purpose, and, therefore, that he was not acting in the company's business, or that, the admission being made in an attempt to compromise the matter, it should not be treated as an admission. If anything is settled by our decisions, it is that, unless an objection clearly advises the trial court of the specific ground upon which it is made, it will not justify a reversal. Among the cases supporting this rule are the following: *Rash v. Whitney*, 4 Mich. 495; *Hoard v. Little*, 7 Mich. 468; *Young v. Stephens*, 9 Mich. 507; *Morrissey v. People*, 11 Mich. 332; *Hollister v. Brown*, 19 Mich. 166; *Gilbert v. Kennedy*, 22 Mich. 118; *Snyder v. Willey*, 33 Mich. 490; *Campbell v. People*, 34 Mich. 351; *Ward v. Ward*, 37 Mich. 259; *Stevens v. Hope*, 52 Mich. 69, 17 N. W. Rep. 698; *Merkle v. Bennington Tp.*, 68 Mich. 145, 35 N. W. Rep. 846; *Jennison v. Haire*, 29 Mich. 207; *Heymes v. Champlin*, 52 Mich. 26, 17 N. W. Rep. 226; *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. Rep. 690; *Bulen v. Granger*, 63 Mich. 311, 29 N. W. Rep. 718; *Abbott v. Chaffee*, 83 Mich. 256, 47 N. W. Rep. 216; *People v. Moore*, 86 Mich. 134, 48 N. W. Rep. 693; *Hutchinson v. Whitmore*, 95 Mich. 592, 55 N. W. Rep. 438; *Association v. Fisher*, 95 Mich. 274, 54 N. W. Rep. 759; *People v. Durfee*, 62 Mich. 491, 29 N. W. Rep. 109.

A motion for a new trial was made upon the following grounds: 1. The damages were excessive; 2, the damages are so excessive as to evince passion, prejudice, partiality, or corruption of the jury; 3, the verdict is against the weight of evidence. The court found that the damages were excessive; that they were not so excessive as to evince passion, prejudice, or corruption, and that they do not exist; that the jurors were so moved by sympathy for the plaintiff, and by their common knowledge of the financial ability of the defendant, and their belief of large amounts expended by the defendant for medical expert evidence, as to have awarded a larger amount than they otherwise would have done, and to that extent partiality is found; that the verdict is not contrary to or against the weight of evidence. The order was then made ordering a new trial, unless \$6,500 should be remitted from the verdict. Error is assigned upon this order. Counsel argue that \$3,500 is excessive damage

for a stiff arm; but we cannot say that it is so clearly excessive as to justify our interference upon that ground. We are also of the opinion that making a new trial dependent upon a refusal to remit a portion of the verdict in cases of this kind is a well-settled practice in this State, where, as in this case, the amount of unliquidated damage is the only question involved. It has always been considered lawful for the trial judge in such a case to set aside a verdict as excessive; and it has been a common practice to grant a portion of the relief asked by requiring a remission of a portion of the verdict as a condition upon which the new trial will be denied. This has always been a matter of discretion, and, where it is not clearly erroneous, the action of the trial court should not be disturbed (1).

Several other questions are raised, but our investigation of them leads to the conviction that they do not furnish a ground for reversal of the case. We think it unnecessary to discuss them. The jury found a cause of action, and that left merely the question of the amount of damages to be awarded. These involved pain and suffering, and prospective as well as past deprivation of the use of the arm. Such damages are not altogether a matter of mathematical computation, but they are determined by the consensus of opinion of the jury, acting under the direction of the judge. The question of new trial was within the discretion of the court.

The judgment of the Circuit Court is affirmed. The other justices concurred.

PETERSON V. WESTERN UNION TELEGRAPH COMPANY.

Supreme Court, Minnesota, January, 1899.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—LIBELOUS MESSAGE SENT OVER COMPANY'S WIRE. — Where the station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the wires of said company to another of its station agents, addressed for delivery to a third person, which is done accordingly, the company is liable in punitive damages.

The verdict of the jury on behalf of plaintiff for the sum of \$2,000 held excessive, and that a new trial should be granted, unless the plaintiff consent to remit all of the same in excess of \$1,000.

(Syllabus by the Court.)

1. On the question of EXCESSIVE DAMAGES, see NOTE OF CASES IN WHICH VERDICTS HAVE BEEN REDUCED UPON APPEAL, 5 AM. NEG. REP. 232-233, *ante*.

APPEAL from order of District Court, Brown County, denying new trial after verdict for plaintiff.

FERGUSON & KNEELAND, for appellant.

S. L. PIERCE, for respondent.

BUCK, J. — Action for libel. Verdict for plaintiff for \$2,000 damages, motion for new trial on part of defendant, which was denied, and it appeals. The plaintiff was a State senator, whose home was at New Ulm, but, the Senate being in session, and while the plaintiff was attending the same at St. Paul, the defendant, through its station agent, G. R. McHale, at New Ulm, sent to the plaintiff the following telegraphic message: "S. D. Peterson, care Windsor: Slippery Sam: Your name is pants. Many Republicans." This case has been before us on two former occasions. 65 Minn. 18, 67 N. W. Rep. 646, and 74 N. W. Rep. 1022. Upon the first appeal this court construed the message as susceptible of a libelous meaning on its face, but that the verdict of \$5,000 damages against the defendant was so excessive as to justify the conclusion that it was the result of passion and prejudice. Upon the second appeal the order of the trial court denying a new trial was reversed for errors of law occurring at the trial. The case has been tried four times, the verdicts each time varying in amount.

The more distinct and important errors assigned by the appellant are: First, that the plaintiff is not in any event entitled to recover, under the evidence in this case, anything more than actual damages, and not entitled to punitive damages or smart money; second, that the court erred in charging the jury that McHale, the agent of the defendant, in receiving and transmitting the message in question, represented and stood in the place of the telegraph company, and the defendant is liable and responsible for his acts and conduct in receiving and transmitting the message to the same extent that McHale would have been personally responsible had he been the owner and operator of the telegraph line; third, that the damages awarded by the jury are excessive, and appear to have been given under the influence of passion and prejudice. Upon the first proposition we do not agree with the contention of counsel unless his second proposition is sound as to the acts of the agent and want of liability of the company for his acts. The trial court charged the jury that, if they found from the evidence that the defendant or its agent maliciously published the libel as charged, it was their duty to return a verdict in favor of the plaintiff for such damages as he had sustained to his reputation by reason of the publication, and also gave as part of his charge the language used in the second assignment of error. This, of course, involves the question of the

liability of the defendant for the act of the agent if he was actuated by malice or bad faith, and upon this question the jury found in favor of the plaintiff; that is, under this instruction the jury returned a verdict against the defendant for \$2,000. Of course, if the action had been against McHale personally for his malicious publication of the libel, and the jury had found him guilty, they could have awarded punitive, vindictive, or exemplary damages. It is clearly competent for a jury to find vindictive damages in an action for libel, where the publication was done maliciously. *Newell, Defam., Sland. & L.* 842; *Bergmann v. Jones*, 94 N. Y. 51. In the last case cited it is said that, when the falseness of the libel is proven, as a general rule it is sufficient to warrant the jury in giving exemplary damages.

But the important question in the case at bar is this: Is the company itself liable for exemplary damages by reason of the act of the agent McHale, although it did not know, direct, or authorize it? The answer to this is reached by considering and determining the powers and duties of the agent, and whether he was acting within the scope of his employment. The defendant maintained a general telegraph office at New Ulm, and there McHale had the entire management of the business. Under this power and duty his business required him, as such agent, to examine writings, messages, and communications, and transmit them to persons to whom they were addressed. From the very nature of the business, his position required him to do this. The company cannot well act in the numerous telegraph stations throughout the country except through agents. While these branch offices in general are under the management and control of a superintendent, manager, or the corporation itself, yet this agent is almost universally recognized, as he must necessarily be, as the representative of the corporation itself. In the absence of the master the agent is the vice-principal, superintending and controlling the business there transacted, and of course stands in the place of the master for the time being. It is right, therefore, that the responsibility and obligation of the master should flow with the duty conferred and imposed, where the representative is acting within the scope of his employment. That is the case at bar. McHale had control of the business at the New Ulm telegraph station. He alone saw the libelous message, and sending it was a matter incident to his business, and pertaining to the particular duty of his employment. He was acting in the capacity for which he was employed, and, having this power, he was acting within the scope of his authority. He did not perform the act for his own purpose, but for that of the master who employed him, and for the master's benefit. That he abused the authority is no defense in such

case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault. One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law, and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if, for their malicious acts done in the scope of their employment, the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence the public are greatly interested in such a question, and the liability for such wrongs should rest upon that body which by its acts creates the power and the opportunity for committing them. It would be a lamentable condition of the rights of the citizen if, under the guise of exercising lawful corporate powers, the corporation could permit the citizen to be defamed by the false and malicious publication of its agent while acting as its duly-appointed representative. In Scott & Jarnagin's Law of Telegraphs (sec. 138) it is said that "the company can only perform the duty of sending and receiving a message through the intervention of an agent; and if he may willfully and corruptly interfere with commercial transactions or malignantly expose family affairs, and not involve the company, such a ruling would stimulate the wicked, while at the same time good men would be convinced that their chances for indemnity rested alone upon the solvency of treacherous agents. We have seen no instance in the litigated cases where telegraph companies have claimed such immunity. * * * However, the authorities are numerous and highly respectable, and conclusive except where controlled by binding local decisions, which hold the former [company] liable for the willful acts of the latter [agent], when done in the performance of duties assigned." In the same work it is said (section 138a): "Aside from the statutory and common-law duty of good faith in the transmission of messages for the public, there is another sense in which a telegraph company may become responsible for *mala fides* and malicious use of its franchises. A libel is any false, malicious, and personal imputation, effected by any writings, pictures, or signs, tending to alter the party's situation in society or business for the worse, and a corporation may become responsible for its publication, even in punitive damages." Mr. Wood in his work on the Law of Master and Servant (sec. 323) says that: "It may be regarded as settled by the better class of cases that, whenever

exemplary damages would be recovered if the act had been done by the master himself, they are equally recoverable when the act was done by his servant," — and he cites the well-considered case of *Goddard v. Railway*, 57 Me. 202 (1), where numerous authorities are collected supporting his view. It is true that this doctrine thus enunciated was applied in an action against a railroad corporation, but we perceive no distinction between it and a telegraph corporation. "For a telegraph company is liable *ex delicto* for an injury done by its agents or servants to third persons, for misfeasance as well as nonfeasance." Scott & J. Tel., sec. 6. In Shear. & R. Neg. (5th ed.) pt. 2, c. 9, this question is thoroughly discussed, and it is there said that "where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants in the course of their employment as such, and extends to willful acts." The principle which lies at the foundation of this rule has been differently stated in several judicial opinions, and the abstract justice of the rule itself has been occasionally questioned. But the soundness of the principle and the necessity of the rule, which we have inherited from the Roman law, have received new and convincing illustrations in the immense development of modern corporations. If the rule of *respondeat superior* were now to be abrogated, it would be almost impossible to carry on the present complex business of society. Every person having any pecuniary responsibility would shelter himself behind the forms of a corporation, which would, in such case, be free from all responsibility for the negligence and violence of its agents without direct evidence of authority for their acts, while such evidence could be, in almost every instance, suppressed." This rule may frequently work a hardship, but when the master substitutes an agent or servant in his own place, and clothes him with power to act for the master's benefit in serving the public, he is not permitted to shelter himself behind the plea of nonliability for the act of the agent, and the rule of *respondeat superior* should not be relaxed, whether the master is a corporation or an individual.

Upon the proposition that the verdict of the jury awarding the plaintiff \$2,000 is excessive, the court is in accord with the contention of the defendant. "The sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were estimated to be such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal, and exposing himself to

1. *Goddard v. Grand Trunk R'y*, 57 Me. 202, is reported in 8 Am. Neg. Cas. 316.

serious punishment, and that there is no evidence to justify the inference that the message ever reached the public except through the plaintiff, a verdict assessing his damages at \$5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice." This is the language used by this court in disposing of this case on the first appeal. 65 Minn. 18, 67 N. W. Rep. 646. The same facts as ground for damages appear on this appeal, but the verdict is very much less. The criminal liability for divulging the contents of any telegraph message or dispatch intrusted to him for transmission or delivery is found in Gen. St. 1894, sec. 6782, and is there made a misdemeanor, and punishable as such. This law also applies to all employees. If McHale had merely received the message, without any further act, neither he nor the company would have been liable, although he well knew its contents. The publicity consisted in sending it to another agent or employee. If it could possibly be presumed that other employees might have heard its contents in its transmission, the same presumption exists of silence and secrecy on their part, because of their liability to punishment under the criminal law if they should divulge its contents. But it is not proven, nor can it be legally inferred, that others knew of its contents. The only person to whom its contents were divulged was the agent at St. Paul then under a penal obligation not to divulge the dispatch except to deliver it to the plaintiff. The transmission of the dispatch, its receipt by the St. Paul agent, and the mental distress of the plaintiff constituted the basis of his right to damages. Of course, plaintiff himself making the message public would not be ground for damages, even if so made in order to maintain his right to prosecute this action. Considering all these facts, we are of the opinion that the damages awarded are excessive; that the jury must have been actuated by passion, prejudice, partiality, or swayed by some improper influence. In such case the amount should be reduced or a new trial granted. See *Frederickson v. Johnson*, 60 Minn. 337, 62 N. W. Rep. 388. The order of the District Court denying the defendant's motion for a new trial must be reversed, and a new trial granted, unless the respondent file in the office of the clerk of the District Court where the trial was had a remittitur of the sum of \$1,000 within thirty days after the mandate of this court shall be filed in said District Court. In case such remittitur is so filed, the plaintiff may recover judgment upon said verdict in his behalf in the sum of \$1,000, and the order of the lower court stand affirmed for that amount.

LUND V. WOODWORTH ET AL.

Supreme Court, Minnesota, February, 1899.

EMPLOYEE SMOTHERED BY BRAN IN ELEVATOR BIN — ASSUMPTION OF RISK. — In an action brought by an administratrix to recover damages for the death of her intestate, alleged to have resulted from defendant's negligence while such intestate was in its employ, it is held that, on the evidence, the question of such negligence, and also that of the intestate's assumption of the risk, were for the jury.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Hennepin County, in favor of plaintiff.

KEITH EVANS, THOMPSON & FAIRCHILD, and DAVIS, KELLOGG & SEVERANCE, for appellant.

MOSNESS & COMBS, for respondent.

COLLINS, J. — Plaintiff's intestate, her husband, lost his life in defendant's elevator, and while he was at work therein as a common laborer. Alleging that the death was caused by defendant's negligence, plaintiff brought this action to recover damages, and obtained a verdict. From the evidence it appears that the deceased, his brother, and a brother of the foreman, were at work in a freight car, which was beside the elevator, getting it in condition for a load of bran which was to be shipped; when the foreman stated that he wanted his brother to remain in the car, and that one of the other men would have to go up into the bran bin to shovel. The deceased, who had worked about two months in the elevator, preferred to go up into the bin, because there was less dust there than in the car while it was being loaded, and left the car for this purpose. He went upstairs, and into the bin, took a shovel, and commenced work. About twenty minutes afterwards, the foreman, who had also gone upstairs, and was standing on the floor outside of the bin, and not within the sight of the man at work, asked a question, and received an answer from him. Soon afterwards the foreman spoke again, received no answer, and, thinking an accident had happened, caused the machinery to be stopped. The man had fallen into the bottom of the bin. The bran had also fallen, and covered him up. Death from suffocation immediately ensued. The bin was on the upper floor, and in a dark corner of the building. It was shown that, until the eyes became accustomed to the conditions, nothing could be seen by a man working therein without artificial light. The bin itself was thirteen feet wide, sixteen feet deep, and hopper shaped,

the lower end being called a "leg," a spout being attached beneath, through which the contents of the bin passed as it was being emptied. So far as shown upon the trial, the deceased had worked in the bin but once, the day before the accident, and then while it was being filled, not while bran was running out. This article, it was shown, will not flow freely out of this kind of a receptacle, but it is first necessary to push a stick up through the spout, making an aperture through which the flow can be started. A man is then put into the bin, whose business it is to stand on the sides, and shovel towards the center, thus accelerating the movement. The flow is quite uncertain. Bran will bank up or adhere to the sides, and at times large quantities will suddenly give way, and fall towards the exit. This bin contained about a car load, and nearly half had passed out when the accident occurred. Undoubtedly, the deceased, while shoveling, slipped from one side of the bin towards the center, and was immediately overwhelmed and covered up by a mass of the bran which had fallen, causing him to be smothered to death in a short time. That shoveling in such a place is dangerous work seems certain.

It is the proposition of defendant's counsel that a verdict cannot stand which is based upon the claim that their client was negligent in failing to warn plaintiff's intestate of any danger there might be in doing this work, for the reason that no such issue was tendered by the complaint. We cannot concur in this construction of the pleading. It alleged that the bin was dark, and that defendant wrongfully failed and neglected to furnish suitable artificial light for the safety of the intestate while he was at work therein, and that defendant failed and neglected to provide suitable, or any, appliances in said bin for the protection of those who worked therein, or for the prevention of the sudden descent of bran in dangerous quantities upon such workman; and, by reason of this failure and neglect, the bin became and was a dangerous place in which to perform the work the intestate was sent to do, all of which was unknown to him, and of which he was unable to ascertain, but which was known to defendant. This last allegation was controverted by defendant's answer, and there was considerable contention upon the trial over the issue made thereby. In fact, defendant's counsel insisted all during the trial below, and still insist, that the intestate was not entitled to warning as to dangers, because he really volunteered to leave the car, and to go into the bin, having full knowledge of the kind of work required in that particular place, and appreciating the risk. The pleading was somewhat argumentative, but was sufficient as to this particular point, and was so regarded when

counsel answered, as well as upon the trial. The court charged the jury that the only question as to proper appliances in the bin grew out of the claim that some kind of light should have been provided; so that, finally, defendant's negligence was made to depend, first, upon its failure to advise the intestate of such unusual and unexpected dangers and risks as might not have been obvious to him when going into the bin, but which might have been known to or easily ascertained by defendant; and, second, upon its alleged failure to furnish light in the bin, which might have lessened the danger and risk. Defendant did not claim to have warned Lund as to the slippery and unsafe character of the material he was handling, or the danger and risk incident to going into a bin of this size for the purpose of shoveling bran away from the sides, and towards the aperture in the center through which it ran. Nor did it claim that Lund's previous experience in this kind of work was sufficient to relieve it from responsibility. It did contend that it had fully equipped the elevator with electric lights, among which was a movable one, to be carried about by hand, and which could have been suspended inside of the bran bin. On both of these claims, we think, the question of defendant's negligence was for the jury. The foreman having charge of the work about the elevator fully knew and appreciated the risk and danger appertaining to shoveling bran in a bin of this shape and size, for the purpose of emptying it through its "leg." This was shown by his testimony.

These risks and dangers were unlike those considered in the so-called "Gravel Pit Cases," where the workmen are constantly undermining, and the inevitable result is that the earth must fall upon those who are below and in its way; and were unlike those which attend workmen employed in handling ordinary grain, where, in its movements, the laws of gravitation operate, as a rule, steadily and with uniformity. Not so with bran in a bin which is being emptied. It is uncertain and irregular in its movements. Its adhesiveness will cause the different particles to stick together and to the sides of the bin, requiring much shoveling to detach it; and it may without warning, and when least expected, fall in large quantities, exceedingly dangerous to persons who stand upon it, as Lund was obliged to do while shoveling. While he assumed for himself the ordinary and obvious dangers of the work in which he engaged, he had the right, when sent into this place to shovel, — new employment to him, — to rely upon defendant's obligation to perform its duty. He had the right to assume that he would not, without warning, be subjected to unusual and unnecessary dangers. Of course, it is one thing for a servant to know that dangers exist in a place

where he is set at work, or that there are defects in the instrumentalities furnished him with which to do the work, or that such instrumentalities are wanting, and an entirely different thing for him to know or appreciate the risks which may follow from doing the work in such a place, or in doing it with defective instrumentalities, or without instrumentalities. For instance, Lund may have known that there was danger in working in the bin with or without a light, and yet not have appreciated or even suspected the risk he was taking; for the danger was not open and patent, ordinarily discernible by the use of one's senses. In respect to the claim that a movable light appliance was furnished, which could have been carried into the place, it is enough to say that even if it was in repair and ready for use, and this was in issue on the evidence, there was nothing to show that Lund had ever seen this appliance in use, — that is, with a light turned on, — or that he even knew what it was used for. A laboring man cannot be expected to know these things by intuition, and that is what is demanded, if counsel are right. More than this, it appeared from defendant's own witnesses that the only way in which this light could have been made available at the time Lund was set at work was by signaling the engineer stationed downstairs, and he would then start the dynamo. No effort was made to prove that Lund knew what was necessary in order to advise the engineer that a light was needed at that time of day; and, without this knowledge, the appliance was of no value to him. We conclude that the case, as made by the evidence, was for the jury on the questions of defendant's negligence and the decedent's assumption of risk. Judgment affirmed.

WILSON v. MINNEAPOLIS STREET RAILWAY COMPANY.

Supreme Court, Minnesota, December, 1898.

TROLLEY CAR COLLIDING WITH TRUCK CROSSING TRACK. — Action for the recovery of damages for injuries sustained by the plaintiff in a collision at a street crossing between his wagon and the defendant's electric cars. The trial court submitted the question of the defendant's negligence and of the contributory negligence of the plaintiff to the jury, and gave to them these instructions: "1. Street cars are, in the main, governed by the same rules as other vehicles on the street, and their owners have only equal right with the traveling public to use the street. 2. A street-railway company must at least exercise as much care to avoid collision with other vehicles as the owners of the latter are required to exercise in order to avoid

collisions with the cars. 3. When a driver of a vehicle approaching a street-railway track to cross it sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it; and it is not negligence *per se* in him to attempt it without looking a second time at the car, or for the approach of the car." *Held*, that each of the instructions was misleading and prejudicial.

(Syllabus by the Court.)

APPEAL from order, District Court, Hennepin County, denying new trial after verdict rendered for plaintiff.

KOON, WHELAN & BENNETT, for appellant.

FRANK D. LARRABEE, for respondent.

START, Ch. J. — The plaintiff, while driving a four-horse team attached to a lumber wagon across a public street in the city of Minneapolis upon which the railway tracks of the defendant were located, was injured in a collision between its electric cars and the wagon. This action was brought to recover for his injuries so sustained. The verdict was for the plaintiff in the sum of \$3,083, and the defendant appealed from an order denying its motion for a new trial. The trial court submitted to the jury the question of the defendant's negligence; also the question of contributory negligence on the part of the plaintiff; and gave to the jury, with other instructions, the following: " 1. Street cars are, in the main, governed by the same rules as other vehicles on the street, and their owners have only equal right with the traveling public to use the street. 2. A street-railway company must at least exercise as much care to avoid collision with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars. 3. When a driver of a vehicle approaching a street-railway track to cross it sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it; and it is not negligence *per se* in him to attempt it without looking a second time at the car, or for the approach of the car."

1. The first instruction was given to the jury as an absolute rule of law as to the relative rights of the owners of street cars and those of other vehicles in the public streets. The instruction was incomplete, for it omitted the necessary modifications of the general rule, growing out of the difference in the nature of the two classes of vehicles, such as the construction, motive power, mode of operation, and speed of each. The instruction ignored all of these matters. It is true, as a general proposition, that a street-railway company has no proprietary and superior right to the part of the street whereon its tracks are placed, and that the duty of exercising due care to avoid collisions rests upon it, as well as upon the owner

or driver of other vehicles. But the duty is relative, and in determining in a given case whether either has exercised ordinary care, attention must be paid to the differences to which we have referred. Thus ordinary care and the law of the road require the driver of an ordinary vehicle passing another going in the same direction to drive to the left of the middle of the traveled part of the road. Gen. St. 1894, sec. 1946. Of necessity, no such duty rests upon a street-car company. If the driver of such vehicle is on that part of the street occupied by the railway tracks, and ahead of the cars, but driving slower than the convenience and accommodation of the public demand that the cars should go, such driver has not an equal right with the railway company to keep along the track. His duty is to seasonably get off the tracks, and let the cars pass. So, at a street crossing, whether the company has only an equal right with the traveling public, or a greater or a less right, depends on the circumstances of each particular case, — for example, which one acquired the right of way. The instruction as given, without qualification, and as the law of this case, was misleading and prejudicial, although given in a case where the collision was at a street crossing, and there was no question as to the duty of the plaintiff to turn out and let the cars pass.

2. The second instruction is open to the criticism that the words "at least," as used therein, suggest to the jury that they were at liberty to impose a higher degree of care upon those in charge of the cars than is required of the owners or drivers of other vehicles. As already suggested, each must exercise ordinary care to avoid a collision, but it by no means follows that those in charge of the cars must exercise in all cases the same, or at least as much, vigilance as the drivers of other vehicles, in order to discharge the duty of exercising ordinary care. It may be greater or less, according to the circumstances of each case. The amount of vigilance to be exercised by the one in a given case cannot be determined by an arbitrary comparison with that required of the other.

3. The trial court, by the third instruction, in effect directed the jury as a matter of law that, if the plaintiff saw the cars approaching at such a distance that he could apparently make the crossing safely, he had a right to attempt it, and that it was not negligence for him to make the attempt without looking a second time for the cars. This was a question of fact for the jury. It was for them, upon the facts of this case, to say whether the plaintiff, although he could apparently make the crossing in safety, was justified in the exercise of ordinary care, in attempting it without again looking. It was reversible error to give the instruction.

4. The first and second instructions are copies of detached sentences to be found in the opinion of this court in the case of *Shea v. Railway Co.*, 50 Minn. 395, 52 N. W. Rep. 902. Counsel for respondent seems to assume without argument that because the propositions, when read in connection with their context in an opinion and the question then under consideration, are correct, the action of the trial court in giving them as unqualified rules of law for the guidance of the jury in this case will be sustained. The mere reading of the opinion is a sufficient answer to the suggestion. The third instruction is a copy of a part of the syllabus to the case of *Watson v. Railway Co.*, 53 Minn. 551, 55 N. W. Rep. 742, and, as applied to the facts of that case, it was correct, but, as a general legal proposition, it is not. As there must be a new trial in this case for the errors indicated, it is unnecessary to consider the other questions presented by the record.

Order reversed, and a new trial granted.

GUGGENHEIM SMELTING CO. v. FLANIGAN.

Court of Errors and Appeals, New Jersey, December, 1898.

MASTER AND SERVANT — DEFECTIVE APPLIANCE — EMPLOYEE INJURED BY LADDER BREAKING. — 1. If the master supplies proper tools and appliances for the work in which his employees are engaged, he is not liable for an injury which one of his servants receives by reason of the servant's selecting from such tools and appliances one not adapted safely to his work.

2. If the master furnishes safe ladders, and a servant uses a ladder not provided by the master, but made by a fellow-workman as a temporary makeshift, by reason whereof the servant is injured, the master is not liable for the injury, although the servant may have reason to believe that the ladder he uses is one of those provided by the master.

DIXON, LIPPINCOTT, LUDLOW, ADAMS, BOGERT, and HENDRICKSON, JJ., dissenting.
(Syllabus by the Court.)

ERROR to Supreme Court. From a judgment for plaintiff, defendant brings error.

WILLARD P. VOORHEES and LOUIS MARSHALL, for plaintiff in error.

ALAN H. STRONG, for defendant in error.

VAN SYCKEL, J. — Flanigan, the plaintiff below, was injured by falling from a ladder while engaged in the employment of the said company. This suit was instituted to recover compensation for his injury. A large number of mechanics and laborers were employed

in the work of construction. It was Flanigan's duty to assist the mechanics who were at work on the top of the boilers in the boiler room. The ladder from which he fell was made of two scantlings, on which crosspieces were nailed, and was constructed by employees of the company in the carpenter shop. This ladder was eight or ten inches shorter than the top of the wall against which Flanigan placed it, and, in ascending it, he stepped upon the second crosspiece from the top of the ladder, when the crosspiece broke from the scantling, and he fell to the ground. The wall against which the ladder was placed was a green wall, made of brick. When the crosspiece broke, he seized hold of the top of the brick wall, which failed to support him, the brick separating from the wall. The plaintiff testified that there were good ladders on the premises, suitable for the work in which he was engaged, and there was an entire absence of evidence to the contrary. He also testified that shortly before the accident there was a good, long ladder there, which he had used. He made no inquiry for that ladder, and, without any effort to procure a safe appliance, he took the one near at hand which was obviously unfit for his purpose. The testimony of the plaintiff was that the broken ladder was made by employees of the company on the premises, and the company therefore insisted that it was not one of the ladders provided by the company, but that it was a mere temporary makeshift constructed by co-servants of Flanigan, and that for any defect in it the company was not responsible. But waiving this contention, and regarding this as one of the ladders furnished by the company, is the company liable for the alleged injury? It is admitted that the duty was upon the company to furnish proper ladders for the work in which it was engaged, and to use reasonable care in their inspection. But, when proper tools and appliances are provided upon the premises for the use of employees, no authority can be found for imposing upon the employer the further duty of seeing that the servant does not select from among a number of appliances the one not adapted to the work in which for the time he may be occupied. If such a responsibility is cast upon the master, it would be necessary in his protection to have an *alter ego* to attend constantly upon every workman in his service, to see that he did not use an implement unfitted for his work. The imposition of such a duty upon the master is without reason, justice, or authority to uphold it. This is not a novel question. It has been directly passed upon by this court so recently as June term, 1896, in the case of *Maher v. Thropp*, reported in 59 N. J. Law, 186, 35 Atl. Rep. 1057. The deliverance of this court in that case was "that, if safe and proper tools are supplied by the master, he is not liable for an injury which the servant

receives by using, under the direction of the foreman over such servant, a tool not furnished for, or adapted safely to, the work." In this case there was clearly no duty resting upon the employer which he failed to perform. It was apparent to anyone who exercised ordinary care and judgment that it was not safe to ascend a ladder placed against a green brick wall, and which did not reach to the top of the wall, and then to stand upon the crosspiece next to the top of the ladder. He might reasonably have anticipated that a slip or a misstep, or a break from a latent defect, would throw him from his position, without any means of saving himself except by grasping the green wall, which could furnish him no safe support. If he had selected a ladder of proper length, of which it is admitted there were a number upon the premises, the accident would not have occurred. No negligence on the part of the company appears in the case, and there was error, therefore, in the refusal of the trial court to nonsuit the plaintiff.

After the motion to nonsuit was denied, the company produced as a witness its chief engineer, who testified that the workmen would often pick up scantling, and make a ladder for their own use, which the company tried to prevent, and, when discovered, would order the workman to go and get a proper ladder. He also testified that the ladder from which Flanigan fell was not one of the ladders provided by the company, but that it was made by co-servants of Flanigan. Thereupon the counsel of the company requested the trial court to charge the jury "that the defendant is not liable for the negligence of one of the plaintiff's co-servants; and if the jury is satisfied that the ladder was defective, and that its defective condition was due to the negligent construction of the men who constructed that ladder, the plaintiff is not entitled to recover." In response to this request the court charged the jury as follows, and refused to charge otherwise: "It is a question entirely for you, whether reasonable care was exercised on this occasion in the construction of the ladder that this man got. Where it did come from seems to be a little doubtful. One of the witnesses thinks it was a ladder roughly put together by some of the men; but another witness, called by the defendant, says it was the ordinary ladder furnished by the defendant. However that may be, I charge you that the plaintiff had a right, after that ladder had been in position there, under the eyes of whoever was in charge of that work, having been there several days, and being necessary for him to use to get on top of the boilers,—or, rather, that it is a fair matter to leave to you to decide, whether he had not a right to assume that his employer furnished the ladder. I do not say, as matter of law, that

you must find that the employer did furnish it. You may find that it was not so, that it was a makeshift, that some of the workmen had made it, and that the plaintiff ought to have known it. It is for you to say whether you think, under all the circumstances of the case, he was justified in thinking that it had been furnished by his employer, and for you to determine whether it had or had not been so furnished. If he knew, or ought to have known, the condition of the ladder at the time of the occurrence of the accident, he cannot recover, even though the jury should find that the ladder was defective." To this charge and refusal to charge, exception was taken, and error is assigned thereon. In my judgment, the company was entitled to have the jury specifically instructed that if this ladder was made by the co-servants of Flanigan, and was not one of the ladders furnished by the company, the injury was due to the negligence of a co-servant, for which no action would lie against the master. This doctrine is too well settled to require citation of authorities in its support. The only inquiry is, was the request of the company substantially and fairly charged, so that the company had the benefit of it in the consideration by the jury of the evidence in the cause? In my judgment, the trial judge qualified the legal rule in such a way as to deprive the company of the benefit of it. In the charge upon this subject above quoted, the court said, "It is a fair matter to leave to you to decide whether he (the plaintiff) had not a right to assume that his employer furnished the ladder." And again the court said, "It is for you to say whether you think, under all the circumstances of the case, he (the plaintiff) was justified in thinking that it had been furnished by his employer, and for you to determine whether it had or had not been so furnished." Under these instructions, although the jury found that the company had provided safe and suitable ladders on the premises for their workmen, and that the ladder which broke was a temporary makeshift constructed by Flanigan's fellow-workmen without the knowledge of the company, yet the jury might hold the company liable for Flanigan's mishap, if he had reason to believe that the ladder was furnished by the company. This qualification of the legal rule is in direct conflict with the case of *Maier v. Thropp*, *supra*. In that case the workman who was injured used an appliance for his work by the express order of the foreman who was over him. He had good reason, therefore, to believe that the implements he used were furnished by the master; but this court, on review of that case, said that Maier was properly nonsuited in the trial court. It was wholly immaterial what Flanigan believed in this regard; if his injury was caused by the negligence of a fellow-workman, he had no right of

action against his employer. It was the negligent act of the co-servant which relieved the company from responsibility, and not the knowledge on the part of Flanigan that there was negligence on the part of his co-servant. In this respect there was also error in the charge of the trial court for which the judgment below should be reversed.

The dissenting opinion, delivered January 17, 1899, is as follows:

ADAMS, J. — I find no error, and so shall vote to affirm the judgment. The suit was brought by a workman against his employer. The ground of action alleged in the declaration is the employer's failure to exercise reasonable care to provide the plaintiff with a ladder safe for use in his work. The plaintiff in error, who was the defendant below, insists that the trial judge erred in refusing to nonsuit, and to direct a verdict for the defendant, and in his charge.

It is said that the refusal to nonsuit was erroneous, because the ladder used by the plaintiff was obviously unfit for his purpose, and that, if a master supplies proper appliances, he is not liable for an injury that his servant receives because he selects from such appliances one not adapted safely to his work. Here are two propositions, — one of fact, and one of law. The proposition of law may be admitted, if by the words "not adapted safely to his work" is meant obviously unfit for or ill-adapted to his work. *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. Rep. 1057. The proposition of fact is a deduction from the evidence, and is not sound, unless the unfitness of the ladder was manifest when the plaintiff rested his case. In my view, there was no such manifestation. The evidence showed that on May 14, 1895, the plaintiff, a man fifty-four years old, was in the employ of the defendant, whose smelting works were under construction. He was a laborer, and was helping a Mr. Barrett, a steam fitter, to fit pipes in the boiler and elsewhere, and had worked at that job for a month or more. For about a week the plaintiff had been engaged with Mr. Barrett in the boiler room, where the masons had built a brick wall, which was still fresh. There were ladders in use about the works. The plaintiff said, on cross-examination, "Plenty of ladders; I could not tell you how many." One of them was twenty-six feet long, with rungs inserted in holes bored in the side pieces. The plaintiff spoke of this as "a good ladder," — "a good, long ladder." Peter Nolan, a laborer, employed in helping the steam fitter, described it as "one of those ladders that the rungs were bored and mortised and wedged, — a good, strong ladder, the same as painters use." It did not appear in the plaintiff's case where this ladder was made. So far as that case showed, there was only one ladder of this kind, or, at

least, only one ladder as good as this one. Nolan said, on cross-examination, "To tell the truth, I saw only one good, strong ladder while I was there." A number of ladders, just how many did not appear, were made in the carpenter shop on the premises for the use of masons, and were used by the masons, by workmen who put up the dynamo engines, and by other employees. These ladders were shorter than the twenty-six-foot ladder, and had side pieces of scantling, with strips nailed across for rungs. Up to three days before the accident the twenty-six-foot ladder was in use by Mr. Barrett, and by his helpers, Flanigan and Nolan, in the boiler room. On Saturday, May 11th, some one took the twenty-six-foot ladder away from the boiler room to another room, where men were lining retorts with fire brick, leaving in its place one of the shorter and rougher scantling ladders. This ladder had been made in the carpenter shop, a few days before the accident, of new spruce stuff, and when in position in the boiler room reached to within from six to ten inches of the top of the wall that the masons had just built. Nolan said of this ladder: "It was a scantling ladder. It was made of spruce scantling." His testimony then proceeded as follows: "Q. What size? A. I could not tell you whether the rungs were inch stuff or one and one-half inches. Q. Were the rungs inserted in bored holes, or simply nailed on? A. Simply nailed on, the same as a mason has for a ladder. Q. Do you know anything about where this ladder was made? A. It was made in the carpenter shop. Q. There at the smelting works? A. Yes, sir; there were several made there for the masons. Q. How do you know that? A. Before I helped William Barrett I carried orders from the carpenter shop, and I think a couple of ladders over from there that was made there. Q. And this was one of the ladders? A. This was one of the ladders that was made there. Q. You do not mean that it was one that you carried? A. No; but that kind. Q. It was made for the use of the masons? A. Yes, sir. Q. Did the carpenters use it themselves? A. No; I didn't see the carpenters use those ladders at all. I saw them rig a scaffold for their own use." The accident happened in the afternoon of Tuesday, May 14th. Mr. Barrett was fixing steam pipes on top of the boiler, while Flanigan and Nolan were assisting him, and going on errands for him, — as the plaintiff said, "helping carry pipes, and helping screw them on and screw them off, and taking them to the blacksmith shop, and such things." The plaintiff thus had frequent occasion to go up and down the ladder, — as often as twenty or thirty times a day. At about three o'clock Mr. Barrett sent the plaintiff to the carpenter shop for a chisel. He was returning with it in his hand, and had

nearly reached the top of the ladder, when he fell and was injured. That part of the plaintiff's case which relates to the manner of the accident is found in the testimony of himself and of Nolan. The plaintiff's evidence was that, as his foot was on the second crosspiece from the top, sixteen feet above the ground, and as his shoulders were about level with the top of the boiler, the crosspiece split near its left end, swung down, and hung by its right end. The plaintiff lost his balance, and caught at the top of the wall to save himself. A brick came away under his grasp, and he fell, leaving the ladder standing. The plaintiff was not asked, either on direct or cross-examination, to account for the breaking of the crosspiece. Nolan testified that there was a knot in the crosspiece near a nail, and that the crosspiece broke right by the knot. The jury, no doubt, attributed the breakage to this knot.

These being the facts, it is said that the trial judge should have nonsuited the plaintiff, because the ladder was so obviously unfit for and ill-adapted to his work that it was negligence for him to use it. In answer to the inquiry wherein the unfitness and want of adaptation is supposed to consist, a single particular only is specified. It is said that the ladder was too short, and that the plaintiff should have anticipated that, when he got to or near the top of it, he might slip, or make a misstep, or that something might break by reason of a latent defect, and throw him from his position, so that he would be without any means of saving himself, except by grasping the green wall, which could furnish him no safe support. In this view, it is of no consequence that the ladder was a scantling ladder. The reasoning is equally applicable to any ladder of the same length. It is true that, if the ladder had been longer, the plaintiff might perhaps have saved himself. But this is aside from the point. The questions arising out of the shortness of the ladder are these: Was the ladder, under all the circumstances, reasonably well adapted to the use to which it was put? Was it manifest negligence for the plaintiff not to apprehend the breakage of an appliance that he apparently had no occasion to distrust, and not to view with concern the gymnastic feat of getting on the top of a wall from a ladder a few inches below it? I think that the opinion in which this conclusion is reached places the standard of physical activity too low. An able-bodied workman, who was sure of his ladder, would not find this situation difficult, and ought not to be thrown out of court because he did not foresee that which, so far as appears, he had no reason to expect. If, out of these facts, any imputation of contributory negligence could fairly arise, there was, at least, enough doubt about the matter to make it a question for the jury.

The aspect of the case, when the motion to direct a verdict was made, was not essentially different from what it was when the defendant moved for a nonsuit. Evidence had been received, on behalf of the defendant, tending to show that the crosspiece did not split. This raised a question of fact for the jury. Other evidence had been received, on behalf of the defendant, tending to show that the ladder from which the plaintiff fell was not furnished by the defendant; that the ladders built by the defendant were not scantling ladders, but were made with rungs inserted in the uprights, and nailed, — “excellent, well-built ladders;” and that the scantling ladders were improvised by the workmen, without the consent and against the will of the defendant. This raised another question of fact for the jury, because it contradicted, or at least was inconsistent with, the testimony of the plaintiff and of Nolan, and contradicted, or at least was inconsistent with, inferences naturally derivable from their testimony. The defendant’s witnesses gave some further evidence that rather strengthened the plaintiff’s case. It was thus shown that scantling ladders are commonly used by masons, and are suitable for light work, and, specifically, that the particular ladder from which the plaintiff fell “was one of the ordinary ladders that were in common use about the place,” and that it appeared to those who had occasion to use it to be a good one of its kind, and to be in sound condition up to and on the day of the accident. There is no evidence that it had been weakened by heavy weights. The plaintiff, when he fell, was carrying only a chisel. Upon these proofs, it was not error to refuse to direct a verdict for the defendant.

In the brief of counsel for the company, contributory negligence is attributed to the plaintiff, not because he used too short a ladder, but because he was inattentive to the knot. This seems to be the critical point of the case. As it is not mentioned in either of the opinions that together express the views of a majority of the court, it will not be amiss to touch upon it. The argument is that, in an apparatus so simple as a ladder, a structural defect which the inspection of an employer would reveal must necessarily be obvious to a workman. This is an assumption of fact which the proof in this case does not warrant. The matter stands thus: The company, if it furnished the ladder, was bound to inspect. The workman, who used the ladder, was bound to observe. These duties are not of the same grade. Inspection is more searching than observation. A workman can assume that his employer has performed the duty of inspection. The plaintiff adduced evidence tending to show that the defendant furnished the ladder for the use of its

workmen; that it contained a structural defect ascertainable by inspection, and which exposed the plaintiff to unnecessary risk; and that this defect occasioned injury to him. This made out a *prima facie* case. The defendant's witnesses gave no information about the knot. The same question, as to this defense, was presented by the motion to nonsuit and by the motion to direct a verdict. It was this: Did it affirmatively appear, from the testimony on behalf of the plaintiff, that the defect in the ladder was so obvious, so conspicuous, so glaring, as to make it error for the trial judge not to take the question of contributory negligence away from the jury? The inquiry is, not whether the testimony on the part of the plaintiff showed that he was not negligent, but whether it showed that he was negligent. It is well to bear in mind, in using New York cases, that the rule in that jurisdiction is the other way. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. Rep. 339. The evidence did not show how large the knot was, whether it was yellow or black, tight or loose, superficial or extending through the crosspiece. It did not show just how near the nail was to the knot. In *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. Rep. 30, the defect in a ladder was that one of the side rails was broken off about twenty inches from the top, at or near the point where the top round entered the rail. In *Foley v. Electric Light Co.*, 54 N. J. Law, 411, 24 Atl. Rep. 487, the defect was that a step on an electric light pole was missing. To see a hole in a ladder is proverbially easy, — much easier, certainly, than to see a knot and its relation to a nail. The question may be asked again: Did it affirmatively appear that the defect was so manifest that the plaintiff should have seen it? To me it appears affirmatively that it did not affirmatively so appear. But it is not necessary to go as far as this. It is enough that the evidence left the matter in some doubt. "Where there are doubtful and qualifying circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and as such must be left to the jury, as being within their legal province. The law has said in these cases that the plaintiff shall have the judgment of twelve men, and not the opinion of one man." *Bonnell v. Railroad Co.*, 39 N. J. Law, 192.

Error is attributed to the trial judge for not laying down to the jury the familiar rule that a master is not liable to his employee for the negligence of a fellow-workman. In order to pass intelligently upon this branch of the case, it is important, first, to notice just what the issue of fact was. It was this: Did the defendant furnish the ladder that broke, or did it not furnish that ladder? The plaintiff insisted that the defendant furnished it for the use of its

workmen, and produced evidence tending to prove that proposition. The defendant denied that it furnished the ladder, and alleged that it was a temporary makeshift, put together by some of the men, on their own responsibility, without the knowledge and against the will of the defendant. It is thus evident that, accurately speaking, the law as to the negligence of a fellow-servant is not an element in this case. Either the defendant furnished this ladder, or it did not. If it did not, there is no liability. If it did, and if it performed imperfectly the duties of making and of inspection, the defendant must answer in damages. Either way, it is of no consequence who was employed to construct the ladder. If the defendant was not negligent in discharging a legal duty, the action fails. If the defendant was thus negligent, the co-operating negligence of a fellow-servant will not excuse it. If an employer fails towards a workman in the duty to furnish tools and appliances, and to inspect them, it is no defense that a fellow-workman has been careless. Where an employee is injured by the joint negligence of the employer and of a fellow-workman, the employer is liable. *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. Rep. 1057; *Bevin*, Neg. 743. This case is not within the exception mentioned in the opinion of this court in *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. Rep. 619, for the proof shows that the carpenters who made the scantling ladders did not make them for their own use, and did not use them. I am therefore unable to assent to the proposition that the defendant "was entitled to have the jury specifically instructed that if this ladder was made by the co-servants of Flanigan, and was not one of the ladders furnished by the company, the injury was due to the negligence of a co-servant, for which no action would lie against the master." Such an instruction might, I fear, have occasioned in the minds of the jury the kind of confusion that is the natural product of irrelevance. It is true that no such action would lie. The reason for the failure of the action would be, not that the ladder was made by co-servants, but that it was not furnished by the defendant. Judges differ in the amplitude with which they present a topic to a jury. It is a matter of discretion how far it is judicious to introduce collateral ideas. I think that in this case the trial judge wisely exercised his discretion in favor of the direct line of decision.

Again, error is attributed to the trial judge for instructing the jury in the following words: "It is a fair matter to leave to you to decide whether he (the plaintiff) had not a right to assume that his employer furnished the ladder." And again: "It is for you to say whether you think, under all the circumstances of the case, he (the

plaintiff) was justified in thinking that it had been furnished by his employer, and for you to determine whether it had or had not been so furnished." The context may be found in the opinion by Mr. Justice VAN SYCKEL. It is said that, under this instruction, the jury might hold the defendant liable, although satisfied that it did not furnish the ladder, if they concluded that the plaintiff had reason to believe that the fact was otherwise. This does violence to the charge. The jury could not have understood that they were authorized to substitute the plaintiff's supposition for a fact. It is plain, I think, that the trial judge had in mind the leading case of *Mills v. Ice Co.*, 51 N. J. Law, 342, 17 Atl. Rep. 695, decided by this court, and was applying to the facts the rule there declared. That was the case of a defective ladder in the hatch of a vessel. The plaintiff after safely using the ladder all the forenoon was hurt in the afternoon by a fall resulting from the breaking of a strip which had been insecurely nailed across the side bars of the ladder. He sued the owner of the vessel and was nonsuited because it was not directly shown that the defendant had provided the ladder for its workmen. The court unanimously set the judgment of nonsuit aside, with these words: "We think that the evidence established necessity for a ladder in the prosecution of the defendant's work, and the possession and control of the ladder referred to by the defendant, in a position where it could be and was used by the defendant's workmen, and hence made *prima facie* proof that the ladder was provided for the use of its workmen by the defendant." The instruction under review harmonizes with this decision. It substantially told the jury that the history of the ladder and the uses to which it had been put were evidence upon the question whether the defendant furnished it. There is nothing in the case of *Maher v. Thropp*, to contradict this instruction, which is, indeed, only an application of the familiar rule of law and good sense that every person is chargeable with the inferences naturally arising from his own conduct.

I am authorized to say that DIXON, LIPPINCOTT, LUDLOW, BOGERT, and HENDRICKSON, JJ., concur in this opinion.

CUMMING V. T. A. GILLESPIE COMPANY.

Court of Errors and Appeals, New Jersey, November, 1898.

HIGHWAY — BICYCLIST RIDING INTO TRENCH GUARDED BY RED LIGHTS. — 1. The questions of reasonable care on the part of the defendant, and that of contributory negligence on the part of the plaintiff, were submitted by the trial judge to the jury. *Held*, not erroneous, under the circumstances of the case.

2. The defendant, having dug a ditch across the highway, laid a temporary bridge over part of it on one side of the road, and at night put a red light at each side of the bridge. The plaintiff, approaching on a bicycle, thought that the red light indicated that the danger was between them, and, attempting to pass outside of them, fell into the trench. *Held*, that evidence produced by the plaintiff that it was the usual practice for persons placing obstructions in the highway to put a red light at each end of the obstruction was competent testimony.

McGILL, Ch., and GARRISON, LIPPINCOTT, VAN SYCKEL and VREDENBURGH, JJ., dissenting.

(Syllabus by the Court.)

FROM a judgment of Circuit Court, Essex County, in favor of plaintiff, defendant brings error.

R. M. BOYD, JR., for plaintiff.

E. B. GOODELL, for defendant.

DIXON, J. — On the evening of August 13, 1897, shortly before nine o'clock, the plaintiff, a young woman twenty-three years of age, was riding a bicycle on the road known as "Belleville Avenue," in Montclair. It was a moonlight night, but the road lay in the deep shadow of trees. The carriageway was forty feet broad, of which a width of about eighteen feet in the middle was macadamized. The plaintiff rode on the macadam, a little to the left of the center line, her companion being behind, at her right. When she came to a smooth piece of road having a descent of about four feet in a hundred, being an experienced rider, she coasted. Presently she saw, about 300 feet ahead, two red lights, one in the middle of the road, and the other a few feet to the right of it. Knowing that they indicated danger, she pressed her foot against the tire of her wheel as a brake, and checked her speed. After riding thus for something over 200 feet, discerning no obstruction on the left side of the road, and concluding that the danger was between the lights, she resumed coasting, and almost immediately went into a trench at a point a little to the left of the center of the highway. The trench had been lawfully dug by the defendant company for the purpose of laying

a water pipe, and the dirt had been thrown out on the lower side. It extended entirely across the avenue, and over it, between the points marked by the lights, a temporary bridge for the passage of vehicles had been placed, but there was no other covering, barrier, or warning to secure the safety of travelers. The uncontradicted testimony was that, according to the customary mode of giving notice at night of obstructions in highways, two red lights in the road would indicate the extremities of the danger. On this state of facts, with evidence of some other circumstances favorable to the defendant which need not now be noticed, because they were in dispute, the plaintiff recovered damages for the injuries received by falling into the trench, and the defendant seeks to reverse the judgment.

There are three assignments of error, — the first for the refusal of the trial court to nonsuit the plaintiff at the close of her case, the third for the refusal to direct a verdict for the defendant on the whole evidence, and the second for the admission of some testimony offered by the plaintiff. The first and third assignments may be considered together.

To support the claim for a nonsuit or a verdict, the defendant insists that the evidence failed, beyond controversy, to show negligence in the defendant, or established beyond dispute the contributory negligence of the plaintiff. We do not concur in either view. When the defendant had rendered one-half of the highway absolutely impassable for vehicles, its duty was to exercise reasonable care and prudence to notify travelers of that fact; and there is no rule of law which declares, nor must reason necessarily conclude, that this duty was fulfilled when, at night, two red lights were put at the extremities of that part of the road which was safe. It was for the jury to determine whether some further signal or barrier was not reasonably requisite to apprise travelers of the place of danger.

The question as to plaintiff's contributory negligence is a more serious one. It is plain that, by greater caution, she might have avoided the accident. Less speed, or a position upon the bicycle affording better facilities for stopping or dismounting, might have permitted her to save herself from harm. On the other hand, it is clear she was not utterly careless. She perceived the lights. She understood their general import, and pondered upon and tried to discover their special meaning in that situation. She thought she had done so, and her conclusion accorded with the customary significance of such signals. She was entitled to assume that the road was safe unless there was affirmative evidence of danger, and her deliberate judgment was that no such evidence appeared with respect

to the left half of the road. On that judgment she acted, and, had it been correct, she would have gone on in safety. She did not see the trench nor the pile of dirt beyond it. The deep shadow of the trees concealed them, and she did not learn of their presence until she fell, so that, even if she had been riding very slowly and with her feet upon the pedals, she might still have fallen.

Under these circumstances, on which tribunal, the judge or the jury, did the law cast the duty of determining whether the degree of care that she exercised was that of reasonable prudence or not? The law does not attempt to define the requirements of reasonable prudence for the great variety of circumstances presented in litigation and therefore in all cases it must be a question of fact whether reasonable prudence appears. The decision of such questions is generally committed to the jury, and only when reasonable minds cannot, in view of the evidence, differ upon the question, is the judge authorized to pronounce the decision. In the present case the trial judge held that there was room for such a difference, and submitted the matter to the jury, with appropriate instructions. We find ourselves unable to conclude that his opinion was erroneous in law. Our own differences admonish us that he was not wrong.

The remaining assignment of error is that the plaintiff was allowed to prove what was the usual practice with respect to placing lights as signals upon obstructions in public roads. We think this evidence was legally admitted. It bore upon the question of reasonable care in the defendant, not that compliance with the custom would necessarily exonerate, or noncompliance inculcate, the defendant, but that its conduct in that regard would be a material fact for the consideration of the jury. Likewise it was relevant in passing upon the plaintiff's behavior. If she had ascribed to the signals a meaning contrary to their usual significance, it might have argued less prudence in securing the elements of a reasonable judgment before determining upon her course. Although she did not distinctly swear that she knew the custom, yet her deciding according to it was some indication that she did know it, and so the custom became an important fact for her guidance.

We find no error in the record, and the judgment must be affirmed.

MCGILL, Ch., and GARRISON, LIPPINCOTT, VAN SYCKEL, and VREDENBURGH, JJ., dissenting.

NEWARK ELECTRIC LIGHT AND POWER COMPANY v. RUDDY.

Supreme Court, New Jersey, November, 1898.

BOY INJURED BY PICKING UP BROKEN ELECTRIC LIGHT WIRE FROM SIDEWALK — *RES IPSA LOQUITUR*. — Proof that an electric light wire, controlled by a private corporation, and normally suspended upon poles along a public street, was trailing broken on the sidewalk, affords a presumption of negligence in a suit against such corporation by a person injured through electric shock by contact with such wire. "*Res ipsa loquitur*" (1).

(Syllabus by the Court.)

FROM a judgment of Circuit Court, Essex County, in favor of plaintiff, defendant brings error.

The plaintiff, a child of eight years, picked up from the sidewalk of a public street the end of a broken wire that trailed from one of

1. *The following are some recent cases arising from Injuries sustained from Contact with Electric Wires:*

In *CITY OF KANSAS CITY v. FILE ET AL.* (*Supreme Court, Kansas, January, 1899*), 55 Pac. Rep. 887, an action for injuries sustained by a little girl from contact with a live wire, it was held that when an electric light wire in a city breaks and falls down and remains in the street for three weeks, constituting thereby a dangerous obstruction to travel, and causing injury to a passer-by, both the city and the electric light company are presumed from the lapse of time to have knowledge of its condition and dangerous character, and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired.

In *GREMNIS' ADM'R. v. LOUISVILLE ELECTRIC LIGHT CO.*, (*Court of Appeals, Kentucky, January, 1899*), 49 S. W. Rep. 184, it was held that a workman who goes upon a roof to assist his foreman in repairing a skylight is in the performance of his duty so as to

render an electric-light company liable for injuries to him resulting from its failure to make perfect the insulation of its wires, if he is standing or moving in a space where he can readily answer the calls of his foreman.

In *OVERALL v. LOUISVILLE ELECTRIC LIGHT CO.* (*Court of Appeals, Kentucky, October, 1898*), 47 S. W. Rep. 442, it appeared that while a lineman was engaged in fastening a stay or guy wire for a telephone company by whom he was employed, it came in contact with one of the wires of the defendant company, which was heavily charged with electricity, and which was not properly insulated and the lineman received a severe shock. The court said that it was the duty of the electric-light company to insulate its wire at that point "and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages."

In *TWIST v. CITY OF ROCHESTER*,

the poles on which it should have hung suspended, and sustained severe injury through electric shock. The wire was an electric light wire, under the control of the defendant. This writ of error removes a judgment, on verdict, in favor of the plaintiff in a suit brought to recover damages because of alleged negligence, in the premises, of the defendant. No explanatory or exculpatory evidence was offered in defense.

R. V. LINDABURY, for plaintiff in error.

(*Supreme Court, Appellate Division, New York, February, 1899*). 55 N. Y. Supp. 850, it appeared that a patrol wire was put up among trees where it was liable to become detached by the swaying of the limbs, without sufficient guards to protect it, and had been abandoned and permitted to fall into the street several times to the knowledge of the city. On the night of the accident the wire broke and fell across a trolley wire but did not reach the street. Employees of the street car company pulled the wire down but paused for a moment to attend to their horses when the plaintiff's intestate, walking along the street, was struck in the neck by the hanging wire and instantly killed. *Held*, that the proximate cause of the death was the breaking of the wire in the first instance, and the city was liable.

In *TURTON v. POWELTON ELECTRIC CO.*, 185 Pa. St. 406, the case was for the jury where the evidence showed that plaintiff received an electric shock from a guy wire running from a pole in a street across her yard; that numerous telegraph and other wires were strung upon the same pole the voltage of which was not sufficient to cause the injury; that the insulation in close proximity to the guy wire was worn off by contact with it and that flames and sparks had been seen at this point for months before the accident.

In *MOONEY v. LUZERNE BOROUGH*, 186 Pa. St. 161, it appeared that a telephone wire that had been over a street of defendant for fifteen years without accident, but had not been used for

several months, sagged to such an extent as to interfere with travel and was cut by a member of the borough council and one end wrapped around a post within easy distance of pedestrians crossing a bridge, with the end resting on the ground or in the water. A few months afterwards the wire came in contact with a charged electric-light wire that it crossed in close proximity, and plaintiff's son, while crossing the bridge at night, came in contact with the wire and was killed. *Held*, that the case was for the jury, who were justified in finding that the accident was the natural and probable consequence of the manner in which the telephone wire was fastened to the post.

In *CITIZENS' RAILWAY CO. v. GIFFORD*, (*Texas Civil Appeals, December, 1898*), 47 S. W. Rep. 1041, which was an action for injuries to a boy who came in contact with a charged wire lying in the street and that belonged to the street railway company, the court on appeal reversed a judgment for plaintiff on the ground of the erroneous charge of the trial court, which was that "It was the duty of the defendant company to so construct, operate and maintain the wires with which they operate their cars, in such manner and with such a degree of care and skill as to prevent injuries resulting to persons who may come in contact with such wires; and a failure upon the part of defendant or its servants and employees to so construct and maintain their said wires along their car line would constitute negligence."

SAMUEL KALISCH, for defendant in error.

COLLINS, J. (after stating the facts). — The counsel for the plaintiff in error very properly limited his argument to the question of whether or not the facts proved warranted the submission of the case to the jury on the point of defendant's negligence. That question, now presented by exceptions to the refusal of the court to nonsuit the plaintiff or to direct a verdict in favor of the defendant, was, I think, correctly decided by the trial judge. The defendant was, by law, permitted to suspend along a public street a wire so charged with electricity as to be dangerous to the public if it should break and fall upon the street. This privilege entailed upon it a very high degree of care to maintain the wire intact. It was permissible to presume a lack of exercise of such care when the proof showed the wire broken and trailing on the sidewalk under conditions that rendered possible serious injury to persons lawfully there. Unexplained, the presence on the highway of the charged and broken wire, and the fact of injury received therefrom, justified an inference of negligence in the defendant in whose control and management it was. Such an inference has been judicially permitted even when the wire that broke received the electricity from a wire on which it fell. *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. Rep. 344. It appeared, indeed, that the wire was covered with an insulating substance, of which but a small portion at the broken end was gone, and, if the plaintiff had not chanced to touch this small exposed portion of the wire, he would have received no shock. Still, as it is plainly possible that any break of such a wire may remove the insulation sufficiently to lead to such a result, the defendant, if chargeable at all, must accept that consequence. It happened that the plaintiff was able to produce no witness who had noticed that the wire was down except within five or ten minutes before the plaintiff took it up, and it was argued that so short a space of time forbade any presumption of negligence in not removing it. This argument is beside the point. The plaintiff was not bound to prove when the wire came down. Its presence at the time and place of injury sufficed. Had it appeared affirmatively that the wire had but just fallen, the presumption of negligence would have been simply narrowed to the breaking of the wire. Only in case it had appeared that the breaking was without negligence would the question of reasonably prompt removal have arisen.

We may assume that such a wire, of proper size and quality, skillfully set up and inspected with sufficient care and frequency, will not spontaneously break, and, on the other hand, that undue strain or improper use may weaken such a wire, and cause its fracture.

There remains the possibility of disruption caused by the elements or outside interference. Here lay the stress of the defendant's argument. It was contended that the plaintiff was bound to eliminate every such cause by disproving its existence; but to this argument I cannot yield assent. It is impracticable to frame a rule of general application on a subject so concrete as that involved in a jury's right to say that a particular occurrence speaks in itself of negligence. It is well said by Mr. Justice Garrison in *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. Rep. 190, and 23 Atl. Rep. 167, that "the quantum of proof which a plaintiff must give in order to draw from the defendant explanatory evidence must with certain limits be dependent upon the circumstances of each case." One text writer sententiously sums up the matter thus: "If the accident is connected with the defendant, the question whether the phrase, '*res ipsa loquitur*,' applies, or not, becomes a simple question of common sense." Smith, Neg. p. 248. The following statement is fairly satisfactory: "Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant, and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant." Channell, B., in *Bridges v. Railway Co.*, 6 Q. B. 377, 391 (1). The weakness of this statement is inherent in all attempts

1. In *Bridges v. North London Railway Co.*, L. R. 6 Q. B. 377, the facts were as follows: Plaintiff's intestate was a passenger upon defendant's road. He was in the habit of riding on this road every day, having a season ticket. He occupied the middle compartment of the last car, as the train approached Highbury, and this part of the train was still in the tunnel leading into the town when the train stopped at the platform. There was evidence that the name "Highbury" was called out, and also that soon after "Keep your seats." The train then moved farther down the platform. The deceased was found in the tunnel suffering from injuries that eventually caused his death. It appears that the

part of the road in the tunnel was in a dangerous condition, and that it was dark and filled with steam. At *nisi prius* a nonsuit was directed, from which ruling plaintiff appealed. *Held*, that the nonsuit was proper, there being no evidence which would warrant the jury finding for plaintiff. *Held*, also, that the mere calling out of the names of stations does not constitute an invitation to alight, but whether it is such an invitation depends on the circumstances of each separate case.

The case was appealed and the order affirming nonsuit was reversed, it being held that there were sufficient facts to go before a jury. L. R. 7 H. L. 213.

to formulate the rule. The circumstances to be proved are, as they must be, left indefinite. A plaintiff must, of course, present all evidence reasonably within his power. The case of *Bahr v. Lombard*, *supra*, is authority that, "when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut." This is both reasonable and just; but to exact from a plaintiff such negative proof as will exclude all possible theories of accident consistent with defendant's care would be unreasonable, and would not accord with common sense.

In the brief of counsel, it is complained as follows: "No attempt was made to show that there had been no storm or other violence to account for the falling of the wire. From anything that appeared, a tree, a wall, a pole, a trolley wire, or some other object may have fallen upon it and broken it. The local circumstances were as much, at least, within the knowledge of the plaintiff as of the defendant. The accident happened at the door of the plaintiff, and he must have known and have been able to show whether or not there was any external cause for the breaking of the wire. He could at least have shown that it parted without any apparent reason other than its own weakness." This complaint assumes a duty in the plaintiff to prove what were not the circumstances of the case, instead of what they were, and puts on him a burden properly belonging to the defense. In *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. Rep. 484, this court adjudged that a nonsuit was wrong, although the only proof for plaintiff was that a brick fell from among defendant's workmen, bricklayers and hodcarriers, engaged in constructing a wall at a considerable height. By the argument now pressed upon us, the nonsuit should have been upheld, because the plaintiff failed to disprove a hurricane or seismic disturbance. In *Railway Co. v. Bennett*, 60 N. J. Law, 219, 37 Atl. 730, the only proof of negligence was the fact that a horse was shocked by electricity when he stepped upon the track of defendant's electric street railway. The court of errors and appeals sustained the submission of the case to the jury. In an almost exactly similar case an appellate division of the New York Supreme Court reached like result. *Clarke v. Railroad Co.*, 9 App. Div. 51, 41 N. Y. Supp. 78. In that case, as here, the defendant argued that, to sustain an inference of negligence, all other hypotheses must be excluded by the plaintiff's proof. It was suggested that the defendant's road might have been in perfect order, and that the accident might have been occasioned by the

carelessness of third persons engaged in stringing telegraph or telephone or electric-light wires. Bartlett, J., thus met the argument: "The rule is one that relates merely to negligence *prima facie*, and it is available without excluding all other possibilities. * * * The doctrine of *res ipsa loquitur* simply calls upon the defendant after proof of the accident, to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse."

In the case before us, how could the plaintiff have shown that the wire "parted without any apparent reason other than its own weakness?" He had no control over, or power or opportunity to examine and test it. Proof that the fracture must have come from external violence was peculiarly within the province of defendant. It could have proved when and how the wire was put up; to what usage it had been subjected; how often, how carefully and how recently it had been inspected, and what its appearance after disruption indicated. In short, the defendant could have exonerated itself from the *prima facie* case made against it if exoneration had been possible. The plaintiff was not called on to conjecture and disprove possibilities of exoneration.

The judgment will be affirmed.

ATLANTIC CITY RAILWAY COMPANY v. GOODIN.

Court of Errors and Appeals, New Jersey, January, 1899.

CARRIER AND PASSENGER — CROSSING TRACK FROM TRAIN TO STATION AND KILLED BY PASSING TRAIN. — 1. A duty to look and listen for trains, before stepping upon a railroad track lying between the station and a train discharging and receiving passengers at a regular stopping place, is not necessarily chargeable, as a matter of law, upon a passenger alighting from such train and proceeding at once towards the station.

2. Under the particular circumstances of this case, the question of negligence in such a passenger was properly submitted to the jury.

3. In this state, a valid marriage can be contracted *per verba de presenti*, without a ceremony and without a witness. *Quære*, as to nonresidents, since the act of 1897 (P. L., p. 378).

McGILL, Ch., and LIPPINCOTT and VAN SYCKEL, JJ., dissenting.

(Syllabus by the Court.)

ERROR to Supreme Court. There was a judgment for plaintiff, and defendant brings error.

J. WILLARD MORGAN and C. V. D. JOLINE, for plaintiff in error.

GEORGE J. BERGEN, for defendant in error.

COLLINS, J. — The writ of error in this cause removes a judgment for damages, recovered on verdict, under the death act. The chief complaint is that the trial judge refused to decide, as matter of law, that the decedent was guilty of negligence contributing to his death, but submitted the question of such negligence to the jury, as one of fact. The defendant operates a double-track railroad between Camden and Atlantic City. At Lawnside, one of its regular stopping places for accommodation trains, the station adjoins the west-bound track. Outside the east-bound track there is an uncovered platform, level with the track, where the conductor and trainmen stand to assist passengers; but, up to the time of the occurrence in controversy, passengers on east-bound trains had been permitted, without objection, to alight, if they wished, on the side of the train towards the station, and it was customary for those living on that side of the town, or those who wished to go to the station, to alight upon that side. Each rail of each track was planked, on both sides, the whole length of the platform, and the intervening spaces were filled in with cinders to the level of the tops of the rails. There was no special place of crossing provided. The company had published to its employees the following rule: "Any train approaching a station, when a passenger train is receiving or discharging passengers, must be stopped before reaching the station, and must not proceed until the passenger train moves away, or a signal is given to go on, except when safeguards are provided." There were no safeguards at Lawnside, and no gates on the car platforms. On July 21, 1896, John H. Goodin was a passenger on an east-bound accommodation train, scheduled to stop at Lawnside, where he lived. It did stop there. The car in which Goodin rode was carried beyond the platform, and, on that side, stood opposite a ditch and embankment beyond. Goodin alighted on the side towards the station, and was struck and instantly killed by a west-bound express train. There was nothing to prevent his seeing the train, had he looked before stepping on the track. It is contended that he was indisputably negligent.

There are adjudged cases that hold that where a railroad company provides a convenient place at which to alight from a train, and invites egress only there, a passenger takes the risk of alighting elsewhere. Those cases are pressed upon our consideration. Whether sound or not, they do not touch the point of the present inquiry, viz.: What is the duty of passengers where, after they have alighted, there is necessity to cross a track in order to reach the company's station? We are asked to apply the same rule of duty to look and listen that is rigidly enforced upon the

traveler on a highway. There is a plain difference between the case of such a traveler, about to cross a railroad, and the case of a passenger entitled to safe-conduct to or from the company's station. In this State, and in most other jurisdictions, this difference is recognized by the courts. Vice Chancellor Van Fleet, in *Klein v. Jewett*, 26 N. J. Eq. 474, 479 (1), points out that the rule of duty at a public crossing has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross the track in order to reach the station or the cars. He says: "They [the railroad company] are bound to provide a way by which passengers may pass in safety. If the way provided crosses a track, no train should be permitted to pass over it, at the point where passengers are required to cross it, while a train is receiving or discharging passengers." On affirmance by this court (*Jewett v. Klein*, 27 N. J. Eq. 550 [2]), Mr. Justice Dalrimple said that a passenger, crossing a track which intervened between a station and a train standing at the station to receive passengers, was not bound to look to see whether another train was approaching. That decision would seem to be controlling in this case. A distinction is urged, because it related to a crossing from station to train, and not from train to station. This is a distinction without a difference. It is the passenger's right to go to the company's station, and a safe way for the purpose must be provided. In the later case in this court of *Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 175, 19 Atl. Rep. 178, 180 (3), Mr. Justice Depue well states the true rule thus: "The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access are reasonably safe." The great current of authority elsewhere is to the effect that failure to look for trains when crossing a track, in passing from train to station, is not necessarily negligent. The question is always one for the jury. The New York cases are most numerous, many of them being in the court of last resort. A full citation will be found in *Van Ostrand v. Railroad Co.*, 35 Hun, 590 (4). The following

1. *Klein v. Jewett*, 26 N. J. Eq. 474, is reported in 5 Am. Neg. Cas. 1. *Trautwein*, 52 N. J. Law, 169, is reported in 5 Am. Neg. Cas. 21.

2. See 5 Am. Neg. Cas. 1.

4. *Van Ostrand v. N. Y. Central, etc., R. R. Co.*, 35 Hun, 590, is reported

3. *Del., Lack. & W. R. R. Co. v.* in 5 Am. Neg. Cas. 406.

decisions in other jurisdictions are clear and explicit on the subject: *Railroad Co. v. Johnson*, 59 Ark. 122, 26 S. W. Rep. 593 (1); *Railroad Co. v. Hodgson*, 18 Colo. 117, 31 Pac. Rep. 954 (2); *Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. Rep. 2 (3); *Boss v. Railroad Co.*, 15 R. I. 149, 1 Atl. Rep. 9 (4); *Railroad Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. Rep. 281 (5); *Robostelli v. Railroad Co.*, 33 Fed. Rep. 796 (6). In the case last cited, the doctrine was even applied where the crossing was not to a station building, but to a mere gate of exit, customarily used to reach the town; the stopping place being at a junction, with a single platform, on the opposite side. Some of the earlier Pennsylvania decisions were not very discriminating, and may seem to uphold the defendant's contention; but the later cases are in substantial accord with the general trend of judicial opinion. *Railroad Co. v. White*, 88 Pa. St. 327 (7); *Flanagan v. Railroad Co.*, 181 Pa. St. 237, 37 Atl. Rep. 341. The only decision to which we have been referred, directly supporting the proposition that it is necessarily negligent for a passenger to cross from train to station without looking for a possible train on an intervening track, is *Connolly v. Railroad Co.*, 158 Mass. 8, 32 N. E. Rep. 937. That decision treats the question inadequately, without noticing the right of passengers to assume that their safety will not be imperiled by the carrier. The precedents cited are all highway cases. Massachusetts seems to stand alone on this subject (8).

That, in the case in hand, the passengers were invited to alight only upon a platform on the side away from the tracks, is not a controlling circumstance, but simply a fact for the jury. Such was

1. *St. Louis & S. W. R'y Co. v. Johnson*, 59 Ark. 122, is reported in 2 Am. Neg. Cas. 157.

2. *Denver & Rio Grande R. R. Co. v. Hodgson*, 18 Colo. 117, is reported in 2 Am. Neg. Cas. 226.

3. *Phila., Wilm. & B. R. R. Co. v. Anderson*, 72 Md. 519, is reported in 3 Am. Neg. Cas. 706.

4. *Boss v. Prov. & W. R. R. Co.*, 15 R. I. 149, is reported in 6 Am. Neg. Cas. 401.

5. *Chicago, Milw. & St. Paul R'y Co. v. Lowell*, 151 U. S. 209, is reported in 7 Am. Neg. Cas. 373.

6. *Robostelli v. N. Y., N. H., etc., R. Co.*, 33 Fed. Rep. 796, is reported in 7 Am. Neg. Cas. 591.

7. *Penn. R. Co. v. White*, 88 Pa. St. 327, is reported in 6 Am. Neg. Cas. 276.

8. For other actions in the several States and territories and the Federal courts relating to ALIGHTING FROM TRAINS etc., see vols. 2-7, AM. NEG. CAS., where the same are chronologically grouped from the earliest period to 1896, and arranged in alphabetical order of States. For subsequent actions see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

the fact in all the cases cited. The passengers were not forbidden to alight on the other side, but, on the contrary, had always been permitted to do so. Wherever they should alight, they would have to cross the tracks to reach the station, where they had a right to go, and there could be no appreciable difference whether they should alight on the platform, and then walk around the train, and cross, or wait until the train should move on before crossing, or, as Goodin did, alight on the side towards the station, and cross at once. In *Railroad Co. v. Lowell*, *ubi supra*, there was a notice posted in the cars that passengers leaving a car by the front should pass to the right, and by the rear to the left (to a platform), in order to avoid trains on the other track. A passenger failed to observe this rule in alighting from a car, and, in attempting to cross an intervening track, to the opposite side of a double station, was struck and injured by a passing train. In delivering the opinion of the Supreme Court of the United States, Mr. Justice Brown remarked: "Had the plaintiff complied with the notice, and alighted upon the platform, he would still have been obliged to cross the track, with the same possibility of being struck by a passing train that confronted him in this instance." And in *Robostelli v. Railroad Co.*, *ubi supra*, Judge Wheeler thus elaborates the same argument: "Passengers from West New Rochelle, stopping at this station, could not reach there from the train on the track which this train was on, without crossing the other track. They could get off onto the platform, and go past the end of the train, and cross, or get directly down on the other side, and cross. If they should get off on the platform, and wait for the train to leave, they would still have to cross, and there was no shelter or other convenience for waiting. The train could not pass on the other track without the liability of encountering these passengers, and, if it passed while the train was standing, and the passengers alighting, it would be quite likely to encounter them when attempting to cross by the rear of the other train." It is noteworthy that in the case in hand the company's rule forbade the passing of trains only until the train at the station should move on. Strictly construed, that rule made it more dangerous to wait for the train to move on than to cross at once. In the Massachusetts case it was conceded that the passenger had the right to alight on the side of the train towards the station, although there was provided on the other side a platform for that purpose. The ruling was that, wherever he alighted, he was bound to look before crossing the track. It is suggested that Goodin was not intending to go to the station, but to his home, on the same side of the tracks. That circumstance is immaterial.

It existed in several of the cases above cited. Goodin had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track.

One other matter deserves notice. Goodin was a daily traveler by that particular train, and presumably knew that the express was scheduled to pass Lawnside only three minutes before the accommodation was due there; and it is argued that he should have had in mind the fact that it was behind time, as the trains had not passed one another at their usual point of passing. That argument was useful for the jury, but not conclusive for the court. I know of no rule of duty for a traveler on a railroad train to keep alert to such conditions. Within a few weeks there had been a change in the time-table. Before the change, the arrival at Lawnside of the accommodation preceded the passing of the express by nine minutes. It is too much to say that, as a matter of law, Goodin should have remembered the change, and should have noticed that the express had not passed. Besides, he had the protection of the company's own rule not to permit a train to come while his train was receiving or discharging passengers. It was not proved that he knew of this rule; but several of the decisions above cited hold, and I think rightly, that knowledge of such a rule by passengers may be presumed. For this reason, also, the Massachusetts case, *ubi supra*, is unsatisfactory, for it declares a contrary presumption. A careful reading of the whole testimony convinces me that, under the circumstances of this case, the question of contributory negligence was for the jury.

The only other errors assigned relate to the beneficial right of the plaintiff individually, in her suit as administratrix. Goodin left no child, or descendant of a child, and no parent. The plaintiff claimed, as widow, the entire benefit of the suit. P. L. 1897, p. 134. If she were not such, there could have been no recovery under the declaration as framed; and, while proof showed that the deceased left a sister, the case was not tried on any theory that recovery could be had in her interest. The measure of damages, of course, would have differed; and, as the judge, in his charge to the jury, put the matter of damages on the basis of a recovery by a widow, it is but fair to consider proof of that status as vital. The judge, on the motion to nonsuit or direct a verdict, rightly refused to decide that there was no such proof. There had been a ceremonious marriage between Goodin and the plaintiff many years before; but it was conceded that, soon afterwards, the plaintiff had learned that at the time of the marriage Goodin had a wife, from whom he was separated. Cohabitation was nevertheless continued, and the parties were

reputed to be husband and wife. About 1892 the real wife died. Reliance is placed by the defendant upon the doctrine, declared in chancery and approved in this court, that where one of two persons, knowing of an existing bar to his or her marriage, perpetrates a fraud upon the other, by going through a marriage ceremony, such marriage is void, and that, although such bar be subsequently removed, cohabitation and reputation thereafter as husband and wife will not justify a presumption of marriage. *Voorhees v. Voorhees' Ex'rs*, 46 N. J. Eq. 411, 19 Atl. Rep. 172; *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 20 Atl. Rep. 676. If the plaintiff's case had rested on presumption, it would have failed; but such was not the fact. It rested upon the proof of an actual marriage after the first wife's death. Some proof of reputation of marriage was, indeed, admitted under objection, and its admission is now assigned for error. Under the *Voorhees Case* it was not evidential; but, as it was of no avail whatever to the plaintiff, it was immaterial, and harmless to the defendant. In the *Voorhees Case*, Vice-Chancellor Van Fleet concedes that a contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid; and in the case of *Stevens v. Stevens* (N. J. Ch.), 38 Atl. Rep. 460, Vice-Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority. Dr. Bishop makes it quite plain that in this country, in the absence of prohibitive legislation, no more is required to constitute a legal marriage than that the man shall declare, in words of the present tense, that the woman is his wife, and that the woman shall assent. No witnesses need be present, and no particular ceremony is necessary. Bish. Mar., Div. & Sep., cc. 14, 15, especially secs. 299, 313. The effect of a recent statute of this State is applicable only to nonresidents (P. L. 1897, p. 378), and need not now be considered.

The plaintiff, by her own testimony, made a *prima facie* case of such a marriage contract, made directly after the first wife's death. True, no witness was present; but there was not the slightest reason to doubt the plaintiff's story, and every reason to believe it. It had corroboration in the testimony of a niece of the plaintiff, to whom Goodin had said, in 1892 or 1893, after his first wife's death, "Your aunt now is my lawful wife." One of the exceptions assigned for error the refusal to strike out this admission of marriage, but it was clearly competent evidence. Bish. Mar., Div. & Sep., secs. 1057, 1058. The defendant called no witness, and in no way weakened the *prima facie* proof of such marriage. Of course, the jury might have disbelieved the testimony, and, doubtless, the judge, on request, would have submitted the fact of marriage to the jury,

instead of assuming it as proved by undisputed testimony; but he was not asked to do so, and no exception was taken to the charge. The exception was to his refusal to charge that the "same proceeding" was necessary "to make a common-law marriage, as was entered into before disability was removed." This seems to mean that a ceremonious marriage was requisite, and, of course, the judge properly refused the request. I find no error in this judgment.

MCGILL, Ch., and LIPPINCOTT and VAN SYCKEL, JJ., dissent.

KELLY v. CONSOLIDATED TRACTION COMPANY.

Supreme Court, New Jersey, November, 1898.

BOY BOARDING STREET CAR ON SIDE FURTHEST FROM SIDEWALK.

— A boy twelve years of age was about to take passage on an open electric street car, having a bar across the side next to an adjoining track. Under the conductor's eye, he stepped upon the footboard at the barred side, and, before he was fairly on, the car was started on the conductor's signal, and the boy was thrown down and injured. *Held*, that the questions of the conductor's negligence and of contributory negligence in the boy were for the jury, and that a nonsuit was wrong (1).
(Syllabus by the Court.)

THERE was a judgment of nonsuit and plaintiff obtained a rule to show cause why a new trial should not be granted.

FLAVEL MCGEE, for plaintiff.

A. Q. GARRETSON, for defendant.

COLLINS, J. — In these actions the respective plaintiffs sought recovery in damages for personal injury sustained by the infant plaintiff through alleged negligence of the defendant's servant, and for the resultant loss to the other plaintiff, father of the infant. The two causes were tried together in the Hudson circuit, and the plaintiffs were nonsuited, the trial judge holding that the plaintiffs' proof showed no negligence of defendant's servant, and did show negligence of the person injured contributing to the injury. Such

1. For other actions arising out of injuries sustained while ALIGHTING FROM OR BOARDING TRAINS, STREET CARS, etc., in the several States and Federal courts, from the earliest period to 1896, see vols. 2-7, AM. NEG. CAS., where the same are chronologically grouped

and arranged in alphabetical order of States. The *New Jersey* cases appear in vol. 5, AM. NEG. CAS. For subsequent actions see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

proof was as follows: John Kelly, a lad of twelve years, was injured while attempting to enter, as a passenger, one of the cars of the double-track electric street railway owned and operated by the defendant, in the city of Bayonne. The car was of the ordinary open kind used in summer, with cross-seats, open at each end, to which seats access is had by means of a footboard, affording at once a step for the passenger and a walk for the conductor while collecting fares. This board is hinged, and can be turned up on edge, and held in position. There is on each side of these cars a movable rail, that can be lowered from the roof to form a cross-bar at the end of the seats. It is common knowledge that, when such cars are in service, it is the usual custom to keep this cross-bar down, and the footboard on edge, on the side of the car next to the adjoining track, and that passengers are expected to enter and leave the car on the side away from the track, and towards the nearest sidewalk. Such conditions were assumed, rather than proved, at the trial, and may be assumed now. The car in question was running northward, up Avenue C, and had stopped at a street crossing to take on passengers standing on the east side of the avenue. Kelly and a boy named Moody came from the west side of the avenue, thus crossing the down track, and got on the car from the west side. Moody was first. He mounted the footboard, stooped under the cross-bar, and reached a seat in safety; but, before Kelly was fairly on the footboard, the conductor, although he saw him getting on, gave the signal to start. The sudden forward movement of the car threw Kelly to the ground, and his foot went under the wheels.

It seems to me that, on the question of the conductor's negligence, a clear case for the jury was presented. In giving reasons for the nonsuit, the learned trial judge said that the conductor was not bound to look at the barred side of the car when about to signal the motorman to start, because passengers were not to be expected there. If this be conceded, still the fact remains, if the story of the injured boy be true, that the conductor did see him there, and in a position of danger, yet signaled to set the car in motion. It cannot be said that a carrier owes an intending passenger no duty merely because that passenger is attempting to enter the vehicle in a wrong way or at a wrong place. Such an entrance need not be anticipated; but, if seen, proper care must be exercised for the safety of the passenger, and, the more precarious the situation, the greater should be the care. Elliott, R. R. sec. 1628, and cases cited. If, in the case now under discussion, the footboard was on edge, Kelly's position on it called loudly for care in the starting of the car. The trial judge did not misapprehend the law on this branch of the case,

for he stated that if it had been established in proof that the conductor saw the boy on the footboard or on the side of the car, attempting to get on, it would have been negligent in him suddenly to start the car; but he seems to have overlooked a part of young Kelly's testimony. I quote all on this subject: "The car was stopped, and Jimmy Moody got on first, and I was just starting. I was not right on when the conductor rang the bell. He seen me, and the car gave a sudden jerk, and my foot went under. Q. When the car gave a sudden jerk, what did it do to you? A. It jerked me off on the ground, and my foot went under the wheels. Q. When he rang the bell, how many feet had you on the walking board? A. I had two on; not right on; I was getting on. Q. When he rang the bell, the car started, you say? A. Yes. Q. And that jerked you off? A. Yes. Q. Did both feet go off, or only one? A. The right foot went off ahead of the left foot. Q. The right foot first, and the left one afterwards, did you say that? A. Yes. Q. And which foot went under the car? A. The right foot. Q. Did you leave go of the car, or were you holding fast? A. I was holding. * * * When I went over to Twenty-second street, some more people were standing there waiting to get on, and the car was stopped, and the conductor seen me, and told me to get on, and I went to get on. Jimmy Moody got on ahead of me, and I was not right on when he rang the bell. Q. Were you getting on as quick as you could, or did you loiter? A. I was taking my time getting on. Q. Were you going right along, or did you stop? A. I just went to go in the car, and, before I got in the car, the conductor rang the bell. Q. You said the conductor told you to get on; do you remember what he said? A. He waived his finger at me to get on." The judge adverted to the alleged gesture of the conductor, which he considered only as an invitation to get on the car at the proper place; but he failed to notice that the conductor saw what did in fact follow the gesture. Perhaps he did not so understand the testimony; but I gather from it that the conductor saw the whole situation, or, at least, that there was evidence to go to the jury that he saw it.

The question of contributory negligence, too, I think was for the jury. I cannot say, as matter of law, that the attempt to enter an electric street car at a place where it may be seen, because of barrier or other conditions, that entrance is not invited, must necessarily be negligent, even though the car is held for passengers, and the attempt to enter is under the conductor's eye. It is not a reasonable anticipation that under such conditions the car will suddenly be started by the conductor's order. In this particular case it should

be stated that, although the questions asked on the part of the defense showed an insistence that the footboard was on edge, no witness would so testify, and both Kelly and his companion said that the board was down. Kelly also testified that he did not see the bar. Add to these considerations the powerful one that it is in a boy of but twelve years that negligence is asserted, and both reason and precedent declare against resolution of the question otherwise than as one of fact, on which the plaintiffs are entitled to the verdict of a jury. *Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. Rep. 1094. The rules to show cause will be made absolute.

MAY V. WEST JERSEY AND SEASHORE RAIL-ROAD COMPANY.

Supreme Court, New Jersey, January, 1899.

DEATH FROM WRONGFUL ACT — EXCESSIVE VERDICT — INFANT. —

In an action based upon the act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act or neglect," approved March 3, 1848, the plaintiff is entitled to recover nothing but the pecuniary loss sustained by the person for whose benefit, as next of kin, the action is brought.

Where the deceased was a boy fifteen years of age, with an earning capacity of about twenty dollars per month, and the cause was tried on the basis that the pecuniary benefit to the father could only continue during the minority of the son, if his life had continued, and the instructions of the trial court were to that effect, *held*, that a verdict of \$3,000 was excessive, and that, as the verdict of the jury was based upon a misapprehension of the instructions of the court as to the measure of damage, the plaintiff could have the option of accepting the sum of \$1,500; otherwise, the verdict be set aside, and a new trial ordered.

(Syllabus by the Court.)

THERE was a verdict for plaintiff and defendant obtained a rule to show cause why verdict should not be set aside.

HOWARD CARROW, for plaintiff.

JOSEPH H. GASKELL, JOSEPH THOMPSON, WALTER H. BACON, and JOHN W. ACTON, for defendants.

LIPPINCOTT, J. — This is an action under the death act of this State (1 Gen. St. p. 1188), by the administrator of Mizeal M. May, deceased, against the defendants, to recover damages, for the benefit of the father, as the only next of kin of the deceased. The cause was tried at the Salem circuit, at the January term, 1898, and

resulted in a verdict of \$3,000 damages. The liability of the defendants was conceded at the trial, but the contention upon the rule in this cause is that the damages awarded are excessive. The deceased, the son of the plaintiff, was a boy of about fifteen years of age at the time of his death. The cause was tried upon the basis that the father was entitled to the earning capacity of the deceased until he should arrive at the age of twenty-one years, if he had lived so long, and not beyond that time. *Telfer v. Railroad Co.*, 30 N. J. Law, 188. The rule of law laid down in *Telfer v. Railroad Co.*, *supra*, was that, in actions of this class, the plaintiff was entitled to recover nothing but the pecuniary loss sustained by the person for whose benefit, as next of kin, the action was brought. This is the measure of damages prescribed by statute. Mr. Chief Justice Whelpley, in *Telfer v. Railroad Co.*, said that "it would seem that this would have been the proper rule of damages if it had not been prescribed by the act," — citing *Ford v. Monroe*, 20 Wend. 210; *Pack v. City of New York*, 3 N. Y. 489. The rule as to damages established in *Telfer v. Railroad Co.*, *supra*, has ever since been followed and applied, both in this court and the Court of Errors and Appeals. *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Demarest v. Little*, 47 N. J. Law, 28; *Kinney v. Railroad Co.*, 34 N. J. Law, 274; *Traction Co. v. Hone*, 60 N. J. Law, 444, 38 Atl. Rep. 759, and cases cited. In view of the range of discussion taken in this class of cases, it is worthy of remark that if there exists a mischief in this principle, so well established as the measure of damages, the remedy must be sought by legislation upon the subject. The courts are not at liberty to apply any other rule than prescribed by the statute as it now exists, confirmed by so many decisions of all the courts of this State.

The deceased was a boy of fifteen years of age at the time of the accident which resulted in his death. His occupation was that of a farm laborer, and, under the evidence, the highest amount of wages which he could earn, exclusive of his board, was about \$20 per month, and these were the usual rates for a full-grown, able-bodied man at such labor. There was no evidence that during his minority any increase of wages, beyond this sum, could be reasonably anticipated. There was no evidence that he was qualified, or would be qualified during his minority, for any more remunerative occupation. It is readily perceived that the pecuniary benefit which would accrue to his father by a continuance of his life, during his minority, could reach no such sum as the amount of damages awarded. His father was bound, if he received his wages, to clothe him appropriately, to educate him, and to support and maintain him when he was sick or could not obtain employment. These were burdens which were

imposed upon his father by law. The conclusion reached is that the verdict is clearly excessive. The case exhibits, perhaps, only a misapprehension of the instructions of the trial court upon the rules of law limiting the award of damages to the pecuniary loss sustained; and therefore the plaintiff can have the option, by rule of this court entered by him within twenty days, of accepting the sum of \$1,500, as the damages awarded to him in this action. If such rule be not so entered, then the defendant may enter a rule setting aside the verdict, and ordering a new trial.

ARMAINDO v. FERGUSON.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1899.*

INNKEEPER — FIRE — GUEST INJURED BY JUMPING FROM WINDOW.

— A guest at a hotel on fire injured by jumping to the ground from a room unprovided with "a rope or other better appliance" as required by Laws 1896, ch. 376, sec. 40 (the Domestic Commerce Law), waived all right to maintain an action by reason of the failure to provide the rope where the guest had occupied the room for six months without complaining of the absence of the rope (1).

APPEAL from order, Supreme Court, setting aside a verdict for plaintiff and granting a new trial.

MILLARD F. BROWN, for appellant.

MOSES SHIRE, for respondent.

FOLLETT, J. — This action was begun December 31, 1896, to recover damages of Robert Ferguson, owner, and Anton D'Andrea, the alleged lessee, of No. 112 Main street, in the city of Buffalo, alleged to have been used as an hotel, for the failure of the owner and occupant to provide "a rope or other better appliance" in a

1. In *WEEKS v. McNULTY* (*Supreme Court, Tennessee, November, 1898*), 48 S. W. Rep. 809, it was held that the failure of an innkeeper to put fire escapes on the building, as required by an ordinance, does not render him liable for the death of a guest who perished in a fire that destroyed the hotel where it was not shown that he was at a window or in any position where a fire escape would have

afforded him any benefit, and there was evidence that he had locked himself in his room and was heard beating on the door, one of the panels of which he had kicked out, trying to make his escape, and that one of the windows of his room overlooked another building onto the roof of which he could have leaped in safety and thereby escaped, as was done by others similarly situated.

room occupied by the plaintiff, and from which she attempted to escape during a fire. In 1896 the respondent was the owner of a large brick building, four stories high, and known as "No. 112 Main Street," Buffalo. He leased a portion of this building to Anton D'Andrea, or to Joseph Carlino, which portion one or the other, or perhaps both, by turns, occupied as a liquor saloon; having on the first floor an office and a bar, on the second floor a kitchen and dining-room, on the third floor six rooms, and on the fourth floor six rooms. The rooms on the third and fourth floors were occupied by renters and lodgers. No register was kept in this hotel, which was run on the European plan.

Assuming, without deciding, that No. 112 was, November 1, 1896, an hotel, within the meaning of section 40 of chapter 376 of the Laws of 1896 (the "Domestic Commerce Law"), and assuming, without deciding, that the plaintiff was an hotel guest, within the meaning of that section, I think she waived all right to maintain an action against the defendant for injuries received by reason of his failure to supply her room with a rope. The plaintiff had occupied a room in this building for ten months, and for six months had occupied the room in which she slept on the night of the fire, paying a weekly rent therefor, and eating when and where she chose. She knew that there was no rope in the room, but made no complaint. There were outside iron fire escapes, and the platform to one of them was directly under one of the windows opening out of the plaintiff's room, which window she kept nailed down to prevent unbidden persons from entering her room by the escape. The man who occupied the room with the plaintiff on the night of the fire escaped from the burning building by means of this fire escape, which the plaintiff, through fear or confusion, neglected to avail herself of, and jumped to the ground, receiving injuries, for which she seeks to recover damages. The plaintiff testified that she was twenty-seven years of age, and for ten years had been, by occupation, a professional bicycle rider, riding in races, and thereby, before her injuries, making a comfortable living, but by her injuries her health and strength have been so impaired that she is unable to make a living as before. In *Huda v. Glucose Co.*, 154 N. Y. 474, 3 Am. Neg. Rep. 721, 48 N. E. Rep. 897, it is held that a workman employed in a factory, which was within the statute requiring the owner to maintain fire escapes easily accessible from the workmen's room (Laws 1892, c. 673, sec. 6), might, by acquiescence, waive its provisions, and assume the risk incident to the absence of such escapes. In *Willy v. Mulledy*, 78 N. Y. 310, 315, the

same rule is recognized. Under the authority of these cases, I think the learned trial judge correctly held that, under the evidence in this case, the plaintiff was not entitled to recover.

The order should be affirmed with costs. All concur, except WARD, J., not voting.

BOENTGEN V. NEW YORK AND HARLEM RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1899.*

STREET RAILWAYS—INJURED WHEN ABOUT TO BOARD CAR BY BEING STRUCK BY CAR ON OTHER TRACK. — It was error to refuse to submit the case to the jury where the evidence showed that the plaintiff, while standing on the crosswalk between the tracks of a street railway preparatory to taking a south-bound car that he had signaled, was struck by a north-bound car that he had seen stationary at the corner below when he took his position to board the car, and that approached the place where he was without its speed being checked.

APPEAL from judgment, Supreme Court, Trial Term, New York County, in favor of defendant.

BEN L. FAIRCHILD, for appellant.

PAYSON MERRILL, for respondent.

GOODRICH, P. J. — The plaintiff sues to recover the damages sustained by him in consequence of being run down by a car of the defendant, which was operating a line of horse cars on Madison avenue, in the borough of Manhattan. The answer denies any negligence of the defendant, and alleges contributory negligence on the part of the plaintiff. The court, at Trial Term, at the close of the plaintiff's evidence, dismissed the complaint. The plaintiff excepted, and moved for a new trial. The motion was denied, and, from the judgment and order entered thereon, the plaintiff appeals.

The plaintiff and one Foster had been standing on the south-westerly corner of Madison avenue and Seventy-seventh street, and went out on the lower crosswalk to take a south-bound car. Foster stood on the westerly side of the track, and boarded the front platform. The plaintiff crossed the track, and stood on the crosswalk, on the strip between the two lines of tracks; and while he was standing there, waiting to mount the rear platform of the car, another car, bound north, passed, knocking him down, and seriously injuring him. He testified that, before he took his position on the crosswalk,

he saw the north-bound car stationary at Seventy-sixth street, and that he signaled the south-bound car, which was then at the upper crosswalk of Seventy-seventh street; that he took his position facing the south-bound car, and did not look back again to observe the north-bound car, and while so standing, was struck by the latter, and knocked insensible. It appeared that the platforms of the cars were open on each side, to receive and discharge passengers, and that the space between the sides of the cars as they passed each other was two feet and four and one-half inches.

It cannot be affirmed, as matter of law, on these facts, that the plaintiff was guilty of contributory negligence. That was a question of fact, to be determined, among other things, from the distance between the two cars when the plaintiff took his position, and the speed of both cars. It would have been imprudent for the plaintiff to go between the tracks if the cars were in such proximity that they would pass each other before he could reasonably expect to be able to board the south-bound car; but it was a question of fact whether there was such proximity, and whether the act of the plaintiff in taking his position was the act of a reasonably prudent man.

But, even assuming that the plaintiff took an exposed position, it does not follow that he is necessarily precluded from recovery, provided the negligence of the defendant was the proximate cause of the accident. The plaintiff was standing on a crosswalk. He had the right to assume that the north-bound car, in approaching the crosswalk, would be under control. The instruction of the defendant to its drivers is in evidence. The driver of the down car says: "My instructions were to slow up or stop when I approached a car that is near or on the crosswalk receiving passengers. The south-bound car and the plaintiff were in plain view of the driver of the north-bound car, and he could have seen that the plaintiff was on the crosswalk, waiting to take the down car, and he was therefore bound to obey the rule of the company, and reduce speed or stop. There is evidence tending to show that, instead of doing this, he was urging his horses, without regard to the position of the plaintiff, and passed the place where the latter was standing without checking speed. His speed was such that he did not, and we assume could not, when the accident occurred, stop his car, until it had reached the north crossing of Seventy-seventh street. In other words, he did not check his speed or stop the car, as he easily could have done before he reached the crosswalk; and this raised a question of fact whether the driver was exercising reasonable care, and whether this, and not the position of the plaintiff, was the proximate cause of the accident.

In *Murphy v. Orr*, 96 N. Y. 14, 16, the court said:

"Whoever drives horses along the streets of a city is bound to anticipate that travelers on foot may be at the crossing, and must take reasonable care not to injure them. He is negligent whenever he fails to look out for them, or when he sees, and does not, so far as is in his power, avoid them. * * * The horses, quietly moving on a walk, were completely under his control; and from his elevated seat he could, as is conceded, 'see a block away,' and 'all around, in front and on both sides.' "

This court applied the doctrine of *Murphy v. Orr*, *supra*, to the facts in *Wihnyk v. Railroad Co.*, 14 App. Div. 515, 1 Am. Neg. Rep. 640, 43 N. Y. Supp. 1023, and held the defendant liable where a person was injured on a crosswalk, although seen by the driver of an approaching car only forty feet away. The court said (page 516, 14 App. Div., page 641, 1 Am. Neg. Rep., and page 1024, 43 N. Y. Supp.):

"The accident occurred practically at the crosswalk. At such places the drivers of vehicles must anticipate the probable presence of pedestrians, and be on their guard to avoid injuring them."

We think there was evidence which required the submission of the case to the jury, and that, for the refusal to do so, the judgment and order should be reversed.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

QUILL V. MAYOR, ETC., OF CITY OF NEW YORK.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1899.*

MUNICIPAL CORPORATIONS — REMOVING ASHES A PRIVATE DUTY.

— The duty imposed by law upon the city of New York (sec. 704, ch. 269, Laws 1892, Consol. Act), to remove the dirt accumulated on the streets, and ashes and garbage from the abutting residences, is not a purely governmental function, but a private duty for the negligence in the performance of which by its employees the city is liable (1).

CITY LIABLE FOR ACTS OF EMPLOYEES. — Where a woman was struck and injured by a cart belonging to the street cleaning department, as she was attempting to board a street car, the city was liable.

1. See note to *Denning v. State*, (California) 55 Pac. Rep. 1000, reported in this volume, p. 289, *ante*.

APPEAL from order, Supreme Court, Trial Term, New York County, granting a new trial to defendant after verdict rendered for plaintiff. Transferred from First to Second Department.

J. CAMPBELL THOMPSON (WILLIAM P. MALONEY, on the brief), for appellant.

THEODORE CONNOLY (TERENCE FARLEY, on the brief), for respondent.

CULLEN, J. — This action was brought to recover for injuries claimed to have been inflicted upon the plaintiff by an ash and garbage cart belonging to the street-cleaning department of the defendant, which was being driven along Manhattan street. The jury rendered a verdict for the plaintiff for the sum of \$500. The plaintiff was seeking to board a street car at the time she was struck by the cart. The conductor testified that the cart was marked with the marks of the department, and he identified the person who was driving the cart at the time. The driver of the cart testified that he was in the employ of the department on the day in question, though he denied that any accident such as claimed by the plaintiff had happened. The plaintiff was not concluded by the denial of the driver as to the occurrence of the accident. She might well ask the jury to believe his testimony that he was in the employ of the city at the time, and to disbelieve his statement that the cart had not struck her. The evidence was, therefore, sufficient to support the verdict of the jury, and the order appealed from can only be sustained on the ground that in the service which the driver of the cart was performing at the time the defendant was not liable for his acts.

It cannot be expected, nor would it be profitable, that we should review from the earliest time the development of the law on the liability of municipal corporations for the torts of their servants or officers. The law on this subject is not the same in all the States, and it doubtless rests in many cases upon distinctions that are wholly artificial and on legal fictions. Nevertheless, the principles of such liability and the classes of cases in which the municipality will be held liable and those in which it will be held exempt from liability in this State are well settled by authority, and we may safely start in the present discussion with the case of *Maxmilian v. Mayor, etc.*, 62 N. Y. 160. There the court said:

“There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in

the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes."

In the first case the municipality is liable for the torts of its officers and servants; in the second not. Accordingly, it has been held that a municipal corporation is not liable for the acts of its police officers, its commissioners of charities, its board of education, its health authorities, and generally for officers engaged in such duties or such governmental functions as the State assumes to discharge throughout its whole territory. But the duties which the law considers as imposed on municipal corporations in their corporate character, and not as governmental in the broad sense, are not confined to those which relate to the private property of a municipality nor to undertakings from which it may receive pecuniary profit. In the old city of New York the title to the streets is in the city, though the city merely holds them as trustee for the general public. *People v. Kerr*, 27 N. Y. 188. But in the great majority of cases the municipal corporation has no property right whatever in the streets, the fee being in private individuals, and the easement of passage being in the people of the State. Still it is well settled that for failure of its duty to keep the streets and highways within its territory safe, a municipality is liable. *Weet v. Village of Brockport*, 16 N. Y. 161, note. The same is true of the sewers. *Lloyd v. Mayor, etc.*, 5 N. Y. 369. From the maintenance of neither streets nor sewers does the city derive profit; on the contrary, they constitute a burden and expense. We are entirely willing to adopt the classification of municipal duties formulated by the learned counsel for the respondents:

"First, governmental duties, which have been delegated to the city or town by the people, acting through the Legislature, and which, though performed within circumscribed territorial limits, serve to benefit the people of the State, and in the carrying out of which the municipal corporation is only an agent of the State; secondly, *quasi* private duties, to be exercised for the peculiar advantage of the municipal locality and its inhabitants, and exclusive of any benefit to be conferred upon any person outside of the corporate jurisdiction."

The question, then, is presented, into which class does the duty imposed by law upon the city of New York to remove the dirt accumulating on the streets, and ashes and garbage from the abutting residences, fall? That duty is imposed by section 704 of chapter 269 of the Laws of 1892, commonly called the "Consolidation Act:"

"And to remove from said city or otherwise dispose of, as often as

the public health and use of the streets may require, all street sweepings, ashes and garbage and to remove the newly fallen snow from leading thoroughfares and such other streets and avenues as may be found practicable." The learned counsel for the respondents contends that this is a police regulation, imposed in the interest of public health; that it is governmental, as distinguished from municipal or corporate. The learned trial court upheld this claim so far as the obligation of the city to remove snow, ashes, and garbage is involved, and held that, as the case failed to show in what particular work the driver and vehicle were employed, — whether that of cleaning the streets or of removing ashes, — the defendants were not liable. This ruling is in accordance with the decisions in *Bishop v. City of New York*, 21 Misc. Rep. 598, 48 N. Y. Supp. 141, and *Davidson v. City of New York*, 24 Misc. Rep. 560, 54 N. Y. Supp. 51. It has also the support of two cases in other States. In *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. Rep. 29, it was held that the removal of garbage from the street was the exercise of a purely governmental function, affecting the welfare of the citizens of the State generally; and that a municipal corporation was not liable for the acts of employees engaged in the discharge of such work. In *Connelly v. Mayor, etc.* (Tenn. Sup.), 46 S. W. Rep. 566, substantially the same doctrine of nonliability was held by the courts of Tennessee in the case of a watering cart engaged in sprinkling the streets. With the greatest deference to the learned courts by whom these decisions have been promulgated, we think they proceed on a fundamental misconception of the duty discharged by the municipality. That the city is not liable for the action of its health authorities in the protection of public health, we concede to its fullest extent. But the work undertaken by the city in the cases cited is not at all part of the governmental work or duty of the State in protecting the health of its citizens. Boards of health — probably in all States; certainly in this — have the power to abate nuisances, and also to prevent the creation or occurrence of nuisances. But this work is not done, in the first instance, by the government, or at its expense. The duty of maintaining his premises free from nuisance rests primarily on the owner or occupant, and he must discharge it at his own cost. When he fails to do so, he is liable to indictment and punishment, and the nuisance can be abated. So far as we know, the expense of the abatement of a nuisance is imposed on the offender. The abatement of a nuisance is, doubtless, strictly a governmental work, and for the wrongs committed by public officers in such work the municipality would not be liable. But the work required of the citizen to prevent his property becoming a nuisance

is in no sense governmental. Now, the duty or labor imposed on the city by the consolidation act as to the removal of garbage and ashes seems to us plainly not the governmental function of abating nuisances, but the private duty which would otherwise rest on residents and property owners within the municipality. The State, especially of late years, with advancing civilization, and with increase in the knowledge of hygiene, has in many respects raised the sanitary conditions and requirements in accordance with which it requires its citizens to live, but it has not assumed to furnish from the public funds the cost entailed by those sanitary rules with which it compels the citizen, by threatened penalties, to comply. The duty rests as much on the owner of a farm in Essex county to keep his premises free from any accumulation of garbage or refuse that would constitute a nuisance, or endanger public health, as it does upon the owner of an hotel fronting on Broadway. The State does not assume to transport the garbage or ashes from the farm, nor to see to their deposit in a place where they would be innocuous. In fact, it is only within a few years that the municipalities have assumed this duty. I well remember when, in Brooklyn, all garbage, if not ashes, were taken away from the houses by contract between the property owner and private individuals engaged in the business. In a large part of the territory of Greater New York the same rule still prevails. It is within the last forty years that any general system of sewers has been constructed and maintained in either the city of New York or Brooklyn, although prior to that time there were large sewers on particular streets. Before the construction of the sewers, privy vaults and cesspools were maintained on private property, and the duty rested on the owner to keep those vaults in such a condition as not to become a nuisance, or dangerous to health. The difficulty of private parties, where there is a large and dense population, in properly disposing of their sewage, led to the establishment of public sewers. But in reality it was a private duty, assumed by the municipality on account of the difficulty of the citizens individually properly discharging it. The same is equally true of the duty now assumed to remove ashes and garbage. As to ashes, they are in no sense a menace to health; they are used for filling in lots and low lands all through the city. The burden of removing the ashes, if the owner does not wish them to remain longer on his property, is primarily just as much his personal obligation as it was to bring to his premises, in the first instance, the coal from the burning of which the ashes proceeded. As to the garbage, we do not see that it can be distinguished in principle from the case of the sewage. Both are occasioned by the acts of private persons, and on account of the

restrictions imposed by urban life the city discharges the private duty of the members of the municipality which it has become difficult for those members to discharge themselves. The same is true of the furnishing of water to the residents. It was primarily a private enterprise. Originally, the burden of obtaining water for potable or other purposes rested on the persons desiring to use it, to the same extent as in the case of flour to make bread. In many places and in many cities to-day it is furnished by private capital. But here again the necessities of urban life, and the impossibility of getting water unless by a general supply from distant sources, has rendered it necessary for municipalities to enter upon the work of furnishing water to their residents. It seems to us that all these duties are strictly municipal. It is entirely probable that many other services that are performed by the citizen, each for his own benefit, will, on account of the great convenience and advantage, in the future, be assumed by the municipal government. Indeed, the distinguishing feature that characterizes such services as municipal is that they are primarily the work of the individual citizens, not assumed by the government throughout the State at large, but rendered necessary to be performed by municipalities on account of the condition of life peculiar to such municipalities.

The order appealed from should be reversed, and judgment ordered on the verdict, with costs to the appellant. All concur.

VAN TASSEL v. READ.

*Supreme Court, New York, Appellate Division, Second Department,
January, 1899.*

LANDLORD AND TENANT — DANGEROUS PREMISES — PROMISE TO REPAIR — WIFE OF TENANT INJURED. — Where upon the renewal of a lease of premises the landlord promised to repair a cistern cover the defective condition of which was well known to the tenant and his wife, who was injured by falling into the cistern, the landlord was not liable for failing to repair where it did not appear that the cover was defective when the property was first put into the possession of plaintiff's husband (1).

APPEAL from judgment, Supreme Court, Trial Term, Westchester County, in favor of defendant.

1. Compare cases in NOTE ON LIABILITY OF LANDLORD AND TENANT FOR DEFECTIVE COALHOLES, 3 AM. NEG. REP. 314, 315.

WILLIAM GEORGE OPPENHEIM, for appellant.

H. T. DYKMAN, for respondent.

WOODWARD, J. — The plaintiff seeks to recover for personal injuries sustained in falling into a cistern, the cover to which had become decayed. Plaintiff's husband rented the premises of the defendant, and had been in possession for a series of years, the annual lease expiring in April, 1896. On the renewal of the lease for another year, plaintiff's husband called attention to the defective condition of the covering of the cistern, and the defendant promised to repair the same. This agreement was not kept, and it is admitted that an accident occurred, and that the plaintiff was seriously injured by reason of the defective condition of the cistern cover. The trial court granted the motion of defendant's counsel for a nonsuit, upon the ground that no recovery could be had for personal injuries which the plaintiff had suffered by reason of the defendant's negligence in failing to keep a verbal agreement to repair the property; and, from the judgment entered, appeal comes to this court.

The failure of the defendant to make the necessary repairs in the covering of the cistern, under the circumstances of this case, could not operate to charge the defendant with the liability for personal injuries sustained by the wife of the tenant. The condition of the cistern was well known to the plaintiff and her husband. There was no negligence on the part of the defendant which could, in any proper sense, be construed to be the proximate cause of the accident; and there was no error, therefore, in granting the motion of the defendant for a nonsuit.

The case of *Swords v. Edgar*, 59 N. Y. 28, relied upon by the plaintiff, is not a parallel case. It was decided by a divided court, which held that primarily the duty was upon the occupants of a pier, built adjacent to navigable waters, for the purpose of loading and discharging freight and passengers, to keep the same in a reasonably sound and secure condition. In the discussion, the court say that:

“ In the absence of any covenant from their lessors to keep the same in repair, that duty, as to all defects arising after their tenancy began, would altogether rest upon them, and there would be no liability upon the lessors. But there may be a state of facts which will cast a liability upon the lessors also. The neglect of this duty, the suffering the pier to fall into such a state of decay as to become dangerous to those lawfully coming upon it, is the creation of a nuisance. * * * Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for damages resulting therefrom, — the lessee in the actual

occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he at first created it, and then demised the premises with the nuisance upon them, and, at the time of the damage resulting therefrom, is receiving a benefit therefrom, by way of rent or otherwise. * * * A pier so defective and insecure when it is leased as that a subsequent injury, received in the proper use of it as if sound, is consequent upon its original condition, is, for the purposes of such an action as this, *per se* a nuisance. Its effect upon third parties is not the result of the manner of the use of it by the lessee. There is but one use to be made of it, — as a place at which vessels may lay, and put off and take on their cargoes. For that use it is rented; and, used therefor, it is the original insecure condition of it which is the cause of an injury."

It is clear that, under the rule laid down in the above excerpts from the opinion of the court, the case at bar cannot be maintained. No evidence appears in the case that the cover to the cistern was originally defective, or that it was in this condition at the time that the property was put into the possession of the plaintiff's husband. The decay, in so far as there is any evidence upon the question, occurred during the time that the family of the plaintiff was occupying the premises; and the mere fact that the annual lease was renewed with a verbal promise to repair the defective cistern cover does not bring the case within any rule of law with which we are familiar.

The plaintiff's husband could, perhaps, have made the repairs, and deducted the cost of the same from the annual rent reserved (*Hexter v. Knox*, 63 N. Y. 561, 567; *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. Rep. 7); and he might be able to recover any loss which might have been sustained by reason of the cistern not being in a condition to be used for the purposes for which it was designed (*Hexter v. Knox*, *supra*); but there are no authorities in this State holding that the lessor, under the circumstances of this case, can be held liable for personal injuries resulting to the family of the lessee by reason of the defects known to him at the time of making the contract. The nuisance developed during the occupancy of the lessee. He alone would have been answerable to strangers lawfully upon the premises for damages resulting from the defective condition of the cistern cover, and the lessor owes no greater duty to the family of the lessee than to strangers.

"A lessee occupying real estate may become liable to a stranger by negligently suffering the demised premises to become dangerous,"

say the court in the case of *Odeh v. Solomon*, 99 N. Y. 635, 1 N. E. Rep. 408. "This liability is independent of any contract between the lessor and lessee. It results from the fact that the lessee is in possession and has the control of the premises, and for that reason he is liable if, by negligently permitting them to become dilapidated and unsafe, third persons are injured. The foundation of his liability is culpable negligence. He is not, as to third persons, a guarantor of the safety or condition of the premises, but is bound only to reasonable care, in his use and occupation of them, so that they may not cause injury to others."

So, in the case of *Edwards v. Railroad Co.*, 98 N. Y. 245, the same doctrine is announced, the court holding that if a landlord "demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence, which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is guilty of no wilful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise."

See *Jennings v. Van Schaick*, 108 N. Y. 530, 532, 15 N. E. Rep. 424; *Tuttle v. Manufacturing Co.*, 145 Mass. 169, 13 N. E. Rep. 465. In the latter case the defendant had agreed, on leasing a farm to the plaintiff and his brother, that it would make certain repairs in the barn floor. The plaintiff, with his brother, entered into possession. The repairs were not made, and the plaintiff was injured by the floor of the barn falling. The trial court directed a verdict for the defendant. On appeal the court say:

"We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor, and had unreasonably delayed in performing his contract. We are not aware of any authority for maintaining such an action."

The judgment appealed from should be affirmed, with costs. All concur.

BARTNIK v. ERIE RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
January, 1899.*

CARRIER AND PASSENGER — INJURED WHILE STANDING IN FERRY GANGWAY BY HOISTING DEVICE BREAKING. — The question of plaintiff's contributory negligence was properly submitted to the jury where it was shown that he was standing at the side of the gangway of a ferry slip waiting for the passengers to come off the boat that he intended to board, when he was injured by being struck by a rod to which was attached a chain that was used to hoist the gangway and that broke, if the place where he stood was not railed off from the gangway.

RES IPSA LOQUITUR. — A *prima facie* case of negligence against a ferry company was made when it was shown that a person on the gangway of the ferry slip was injured by the breaking of the hoisting device (1).

APPEAL from judgment, Supreme Court, Trial Term, Kings County, in favor of plaintiff, an infant, by guardian.

FREDERIC B. JENNINGS (CHARLES MACVEAGH, on brief), for appellant.

WILLIAM M. MULLEN, for respondent.

CULLEN, J. — The plaintiff entered into the ferry house of defendant for the purpose of crossing from Jersey City to New York. As the boat from New York came into the slip, the gates in the ferry house were raised, and passengers were allowed to go on the bridge. To avoid the throng of persons who were coming from the boat, the plaintiff stepped to the side of the gangway for foot passengers, and stood in front of the wheel that is used in fastening the boat to the bridge. While there, a link in a chain which supports in part the weight of the bridge broke, and a rod to which it was attached fell on the plaintiff, breaking his leg. The action is brought to recover damages for that injury.

1. In *PATTON v. PICKLES* (*Supreme Court, Louisiana, April, 1898*), 24 Southern Rep. 220, it appeared that a great crowd of people had been attracted across the river by a fire and were returning and a number of them, among them the wife of plaintiff, were on the bridge leading to the ferryboat when it broke. The court said: "Where a person, having paid for a ticket for ferriage, has, on invitation

of the employees of the ferry company, passed out upon an iron bridge leading to the ferryboat and while standing thereon, it broke, precipitating her into the river, it is not for the passenger to prove that the breaking was due to the negligence of the company, but upon the company to establish affirmatively a state of facts which would release it from responsibility."

The appellant contends that the plaintiff was guilty of contributory negligence in assuming the position in which he was at the time of the accident. The evidence for the defendant tended to show that the place where the plaintiff stood was railed off from the foot passengers' gangway. This was denied by the plaintiff. We think that the question of contributory negligence was one of fact for the jury, in case they found there was no railing there at the time. This case is very similar to that of *Hazman v. Improvement Co.*, 50 N. Y. 53 (1). In that case the plaintiff, to avoid the crowd of outgoing passengers, had stepped on the stringer that separates the gangway for teams from that for foot passengers. While in this position, he was injured by the shaft of a wagon, the horse drawing the vehicle having slipped and fallen in consequence of the improper condition of the bridge. It was held that it was not contributory negligence, as a matter of law, for the plaintiff to stand on the stringer. The court said: "It was not necessarily or ordinarily a place of danger, and the plaintiff had no reason to apprehend such an accident as occurred." So, in this case, the plaintiff had no reason to expect or anticipate the breaking of the chain or the fall of the iron rod. It may be that in some respects the position of the plaintiff was naturally dangerous. He might properly expect to receive greater shock there, from the impact of the incoming boat on either the ferry rack or bridge, than if he stood further back. Had he been thrown into the water, or otherwise injured from such an occurrence, it might well be argued that he assumed the risks of his position. But the accident that happened to him in this case was the very thing there was no reason he should anticipate or foresee; and, as long as he was not a trespasser in assuming his position, the question of his negligence was for the jury.

The only evidence on the part of the plaintiff to establish the negligence of the defendant was proof of the occurrence of the accident itself. The appellant argues that the doctrine of *res ipsa loquitur* only applies "when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation." We think that even within

1. *Hazman v. Hoboken Land & Improvement Co.*, 50 N. Y. 53, is reported in 5 Am. Neg. Cas. 172.

Compare *Dwyer v. N. Y., L. E. & W. R. Co.*, 47 N. J. Law, 9, reported in 5 Am. Neg. Cas. 19; *Tonkins v. N. Y. Ferry Co.*, 47 Hun, 562, reported in 5 Am. Neg. Cas. 438.

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For other actions relating to INJURIES SUSTAINED ON FERRYBOATS OR ENTERING OR LEAVING FERRYHOUSES see vols. 2-7, AM. NEG. CAS., and vols. 1-4, AM. NEG. REP., and the current numbers of that series of Reports.

this rule the plaintiff made out a *prima facie* case. But the proposition is incorrect. In the leading case where the doctrine of *res ipsa loquitur* was applied, there was no contractual relation between the parties (*Mullen v. St. John*, 57 N. Y. 567); and this court has recently held that the relation between the parties has no bearing on the applicability of the rule. *Jones v. Railway Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321.

In the latest case in the Court of Appeals, — that of *Hogan v. Railway Co.*, 149 N. Y. 23, 43 N. E. Rep. 403, — the plaintiff was driving a coal cart on the street under the elevated railroad, when an iron bar fell from that structure, and injured him. Men were working thereon at the time. It was held that the evidence raised the presumption of negligence; and it is said by Judge Bartlett:

“ This being so, it is further assumed that buildings, bridges, and other structures properly constructed do not ordinarily fall upon the wayfarer. So, also, if anything falls from them upon a person lawfully passing along the street or highway, the accident is *prima facie* evidence of negligence, or, in other words, the presumption of negligence arises.”

Nor was the evidence given on behalf of the defendant to rebut the presumption of negligence conclusive. The defendant proved an inspection of some kind, repeated at intervals; but the character of the inspection, and its sufficiency might properly be the subject of criticism. The credibility of the witnesses was also to be considered. On the whole, we think the question was properly submitted to the jury.

The learned trial court charged that the defendant was required to exercise the utmost human skill, care, vigilance, and foresight for the protection of its passengers, and that the rule applied as well to the apparatus and appliances of the bridge as to the machinery of the ferryboat itself. To this the defendant excepted. We think the charge was correct, as applied to the case before us, and well supported by the authorities. Carriers of passengers are not, in every branch of their service, held to this strict accountability. But the rule has never been relaxed as to the condition of the machinery, appliances, cars, and boats, or other vehicles of transportation. *Stierle v. Railway Co.*, 156 N. Y. 70, 4 Am. Neg. Rep. 201, 50 N. E. Rep. 419. The defendant's bridge should not be considered as merely an incident to its principal duty of transportation, and as similar to a platform or waiting-room, but as an appliance used in the very transportation itself. It seems to have been so considered in *Hazman v. Improvement Co.*, *supra*. An insecure condition of the bridge, or its improper operation and

adjustment, might lead to most serious accidents. So that, even if not considered as technically an appliance in the transportation itself, its improper condition or management would present a "situation from which grave injury might be expected, and which therefore imposed upon the carrier's servants the duty to exercise the utmost skill and foresight to avoid it." *Stierle v. Railway Co.*, 156 N. Y. 684, 4 Am. Neg. Rep. 204, 50 N. E. Rep. 834, opinion on motion for reargument.

The defendant's motion to strike out the testimony of the witness Dr. Pfeiffer was too broad, and was properly denied. The plaintiff broke his leg a second time. For this the defendant was in no wise responsible, and so the trial court charged. But that did not render all testimony as to the condition of the plaintiff's leg at the time of the trial incompetent. So far as the testimony of the witness related to the condition of the leg at the point of the first fracture, and due to that cause, it was strictly relevant.

The judgment and order appealed from should be affirmed, with costs. All concur.

WILLIAMS v. HAYS.

Court of Appeals, New York, January, 1899.

LOSS OF VESSEL — CAPTAIN MENTALLY UNBALANCED. — The captain of a vessel becoming temporarily insane from exhaustion due to his efforts to save the vessel is not responsible for its loss due to his negligence while in that condition.

SAME — OFFICERS FAILING TO FORCIBLY TAKE CHARGE. — Where it appeared that the captain of a brig became exhausted from his unabated efforts to save the vessel in a storm and took a large dose of quinine and acted strangely afterwards, and refused help from passing tugs, and the brig drifted upon a beach and was lost, and the mate was on the deck all the time obeying the captain's orders, it was for the jury to say whether the captain's condition was apparently such as to charge the mate with negligence in not forcibly taking charge of the vessel.

APPEAL from judgment, Supreme Court, Appellate Division, First Department, affirming judgment in favor of plaintiff.

HENRY W. GOODRICH, for appellant.

LAWRENCE KNEELAND, for respondent.

HAIGHT, J. — This action was brought by the plaintiff, as assignee of the Phoenix Insurance Company, to recover the amount of insurance paid by the company to Parsons and Loud under a policy of

insurance issued to them as the owners of one-sixteenth of the brig Emily T. Sheldon. The brig had been wrecked on Peaked Hill Bar, on Cape Cod, near Provincetown, Mass.; and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss. The plaintiff claims the right to recover in this action upon the theory that the insurance company became subrogated to the rights of the owners, whom it had insured. The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct, and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts, and irresponsible therefor, and was not in a condition to navigate the brig, on account of sickness, etc. At the conclusion of the evidence, the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict, and asked to go to the jury upon the questions: "First, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm; second, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor; third, whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master; fourth, whether the mate exercised due judgment in regard to the condition of the master; fifth, whether the defendant, in consequence of his efforts to save the vessel during the storm, became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court, and a verdict was directed, to which rulings the defendant's counsel duly excepted.

On Thursday, the 18th day of March, 1886, the brig Emily T. Sheldon left Boothbay, Me., with a cargo of ice, bound for Annapolis, Md. At the time of sailing, the weather was fair, and remained so for about sixteen hours, at which time a storm commenced, with high winds and rain, with a light snow. At the time of the commencement of the storm, the vessel was in George's Channel, and the defendant tacked to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but, not being able to make the cape, she was hove to, to ride out the gale. This was about four o'clock in the afternoon of the 20th,

and she remained hove to until about that time in the afternoon of the 21st, and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between four and five o'clock, Thatcher Island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below, and laid down upon a lounge in his cabin, but, before doing so, took fifteen grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last forty-eight hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about eleven o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half-past eleven the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge, in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again, and finally succeeded in getting him up on the deck of the vessel. There are some little differences in the testimony of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half-past twelve, after the crew had been at dinner. After he came on deck, the tug Storm King came up on their weather quarter, and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The Storm King then went away, and about one o'clock another boat came up under the stern of the brig, and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over, and looked over the stern, but I could see nothing. Then I got into the bow-line; that is a rope with a noose in it, being around my waist; and I was let down over the stern, and I looked at the rudderpost, and it was split, but I could not tell how badly. I went back on deck, and said that the rudderpost was split, and the captain said he didn't think it was, and said, 'I can't see it, and you can't, I think.' Then I began to think there was something wrong with the captain; that he did not

act as he used to. Still, I could not see anything wrong with his manner, except when he spoke to me about the vessel; and he then told me to square the yards to see if the vessel would go off again, and we did, and she did go off, but she came right back again; and I lowered the main trysail down again, and hove the helm up again, but she did not go off; she went sideways in onto the beach, and struck," at about 2:30 o'clock. Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsible answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life-saving boat came alongside, and offered to take him ashore; but he refused to go, and the crew of the life boat had to remain for several hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (143 N. Y. 442, 38 N. E. Rep. 449), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel; and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But, when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible." The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act, we will not now stop to consider.

The judge then proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give

the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. * * * If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration: First. Did the defendant become mentally and physically incompetent to care for and navigate the vessel, solely in consequence of his efforts to save the vessel during the storm? And, second, if he was thus mentally and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel, and procuring a tow? Upon directing a verdict in favor of the plaintiff, the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the Court of Appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine; but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it, rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public, to which individual rights must give way." It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of negligence was not considered. The appellate division has affirmed, following in its opinion, the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued

through Saturday and Sunday, and it was not until five o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last forty-eight hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. Co. Litt. 78; 9 Coke, 22; Co. Litt. 29; 1 Poth. Obl. pt. 1, c. 1. s. 4, sec. 3. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence is a question which has not as yet been determined. It is said that he did nothing to save the vessel. It appears that he was on deck, obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons, and taken the command of the vessel, but mutiny at sea is criminal, and heavily punished. In order to justify such action, he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures, we think, was a question of fact for the determination of the jury, and that it was not within the province of the court to dispose of it as a question of law. The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, J. (dissenting). — I am of opinion there was no question for the jury in this case. The learned counsel for the defendant asked to go to the jury on two questions:

First: "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm." It is true that Judge Earl, writing in this case for the court on the former appeal, stated that, if the defendant had become insane

solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it therefore follows that the determination of this court that the insanity of the defendant was no defense is the law of this case, and was properly followed by the trial judge when he directed a verdict for the plaintiff.

Second. "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor." Judge Earl stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did, or omitted to do, then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act. There is no conflict of evidence upon this latter point, and only a question of law is presented to this court on undisputed facts, — whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sails set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by, and offering a tow to a port nine miles distant. There was no request to go to the jury as to the conduct of the crew. The liability of the captain for the acts of his mates and crew is well settled. Story on Agency (sec. 314) states: "The policy of the maritime law has therefore indissolubly connected his (the master's) personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority." With the same record before us as on the former appeal, I am unable to understand why the former decision of this court should not be followed. 143 N. Y. 442, 38 N. E. Rep. 449. I vote for affirmance.

All concur with HAIGHT, J., for reversal, except BARTLETT, J., who reads for affirmance. Judgment reversed, etc

IDEL v. MITCHELL.

Court of Appeals, New York, February, 1899.

LANDLORD AND TENANT — INJURY TO TENANT'S WIFE. — A landlord was not liable for an injury to his tenant's wife occasioned by a protruding nail in the floor of a hallway used by the tenant when there was no evidence as to the length of time the nail had protruded, which was necessary in order to charge him with constructive notice.

APPEAL from judgment, Supreme Court, Appellate Division, First Department, affirming a judgment entered on a verdict for plaintiff.

The plaintiff, who, with her husband, had occupied the third floor of defendant's building for a period of ten years, was on the 24th day of February, 1893, engaged in sweeping the stairs between the second and first floors when she caught her foot on a nail, and fell backward down the stairs. The result was an injury, and this action was brought to recover damages sustained. The plaintiff testified that, until a short time previous to the accident, there had been a carpet or crash upon the stairs, which, after removal, disclosed a number of nails sticking up in the steps of the stair case. By the terms of the lease, plaintiff was required to clean her own stairs leading from the third story to the second; and, when the second story was occupied the tenant of it was required to clean the stairs leading from that floor to the first. The second floor was tenantless for some time, and so the plaintiff cleaned the stairs leading from the second to the first floor, as well as those from the third to the second, and this she did on Friday of each week. As to the nails in the steps, the plaintiff testified: "I said something to Mr. Halsey about there being a nail or more nails in the stairway. Mr. Halsey said, 'Better take a hammer and drive them in.' He was joking, — 'Better take a hammer and drive it in.' That was done. I did it myself. I had a hammer in my premises. That was about a couple of weeks before I was hurt; six weeks or around like that, — six weeks or a couple of months. Q. Did you drive in more than one nail? A. Yes, sir. Q. All you could find? A. Yes, sir. When I washed the floors or walls, when there was one out, I knocked it in, or I would spoil my fingers. Q. As a matter of fact, you drove in all the nails that were sticking out that you could see? A. That I could see. Q. What part of the stairs was it you drove the nails in? A. In all parts. Q. If there was a nail sticking up high enough for anybody to see it, you drove it in? A. If I felt it, scrubbing the

stairs. Q. You used to scrub the stairs? A. Yes, sir. Q. How often did you scrub the stairs you fell down? A. Nobody was living there. I did not scrub that flight of stairs. I only swept it. Q. You went up and down? A. Yes, sir. Q. when you swept the stairs, — how often did you sweep the stairs? A. Once a week. Q. What night was it you were hurt? A. Friday night. Q. Did you sweep it the same day in the week? A. Friday; Saturday morning it was clean. Q. You swept it every Friday night? A. Yes, sir; nobody was living on the floor. Q. When did you say you noticed there was a nail or two, — when you were scrubbing, or sweeping, or both? A. When I was sweeping. Q. The stairs you used to sweep down are those where you fell? A. Yes, sir. Q. And whenever you noticed a nail, sweeping, you drove it in? A. Yes, sir. Q. During the two months prior to the accident, you swept the entire stairway every Friday, didn't you? A. Yes, sir. Q. In the same general way? A. Yes, sir. Q. Did you step on this nail, or how was it you caught yourself? A. I was sweeping; all at once I stepped on the nail. Q. Stepped on it? A. Yes, sir; I had my foot out, and fell backward. Q. You had never noticed nails in this particular stairway before that time, I suppose? A. No. * * * That nail, I think, I tumbled over on Friday, I did not see that nail there the Friday before." The plaintiff's husband testified: "I examined the stairs the morning following the injury, and I found some nails. They were sticking up from the step. They were protruding from and above the step, — a quarter of an inch, and some half an inch. I took a hammer and a pair of pliers, and some I pulled out, and some I knocked in. Q. In other words, did the step move up and down on the nail, or was it tight? A. Tight; the nail protruded. Q. The nails you pulled out, what were their condition? Were they apparently good nails or rusted? A. Rusted. The sixth juror: Q. I will ask him to describe the nail. In what part of the step was it? A. On the side; the front edge. It protruded above the step at the front edge of the step. I pulled it out. I did not keep the nail. I had pulled out other nails and driven other nails in the whole stairs, from the top to the bottom. Q. Was this nail the same kind of a nail you say you saw just after the carpet was taken up? A. No; all different. I did not examine them. I did examine it enough to give the jury a fair description of it. I testified to the jury that, when the carpet was taken up, there were some nails there. I saw this nail. I pulled out some, and drove in others, whenever I got the chance. This nail was of the same general kind as those nails." No other witnesses were sworn on behalf of the plaintiff, nor did the evidence adduced on the part of the

defendant strengthen the plaintiff's case. The question presented is whether the motion to dismiss the complaint should have been granted.

AUSTEN G. FOX, for appellant.

WILLIAM KING HALL, for respondent.

PARKER, Ch. J. (after stating the facts). — For the purposes of this appeal, at least, it must be deemed to be true that the plaintiff fell owing to a protruding nail in the stairs, and the injuries occasioned thereby this defendant should respond for, providing the plaintiff proved that the protruding nail was due to the fault of the defendant, otherwise not. Such fault would have been shown had the plaintiff proved that prior to the accident the defendant or his agent had knowledge of the protrusion of the nail, or that it had been in that situation for such a length of time that the defendant should have known of it. But it was not proved that anyone ever saw this nail prior to the happening of the accident. For aught that appears in the testimony, it may have been either partly driven into or pulled out of the step within fifteen minutes prior to the accident. It may have been there longer, but whether it was or not the evidence does not disclose. That it had been there longer there is evidence from which a guess might be hazarded, but it would be a mere guess, and guesses have not as yet been, in terms, held to be a proper substitute for proof. The evidence that furnishes an excuse for a guess that the protruding nail may have been in that situation for more than fifteen minutes prior to the happening of the accident is to be found in the testimony of the plaintiff, in which she says, in effect, that some little time previous to the accident, a stair carpet had been removed, and thereafter every Friday she swept and scrubbed the stairs, in the doing of which she noticed a large number of nails sticking up, and she spoke to the defendant's agent about it, who told her to drive them in; and she took a hammer and drove in all the nails she could find. On the Friday preceding the accident, the plaintiff saw some nails sticking up, but she drove in every one of them. She testified: "Q. Did you drive in more than one nail? A. Yes, sir. Q. All you could find? A. Yes, sir. When I washed the floors or walls, when there was one out, I knocked it in, or I would spoil my fingers. Q. As a matter of fact, you drove in all the nails that were sticking out that you could see? A. That I could see. Q. What part of the stairs was it you drove the nails in? A. In all parts." Thus, it appears from the plaintiff's own testimony that, one week before the happening of the accident, she personally drove in all the nails she could find. No one contradicts her, nor asserts the fact to be that this

nail was left protruding after she had completed the task that she set herself, for the very satisfactory reason given by her that she drove in all the nails she could find. Some readers of the testimony might surmise that, notwithstanding all her great care, she overlooked the nail that caused the trouble; but others might guess that some child in play had pulled the nail partly out or driven one partly in, for, according to the testimony of plaintiff's husband, the step was "tight," rendering impossible the conclusion that the nail could have worked out by the springing of the step from the riser as people walked over it. But it would be only a surmise after all, for the evidence does not establish either how the nail came to be in the position in which it was, or how long it had been there. The plaintiff therefore failed to meet the burden resting upon her of establishing that the nail causing the mischief had protruded for such a length of time as to charge the defendant with constructive notice of its presence, and the motion for a dismissal of the complaint therefore should have been granted.

The judgment should be reversed, with costs. All concur, except BARTLETT, J., not voting. Judgment reversed, new trial granted, costs to abide event.

RICKERT v. SOUTHERN RAILWAY COMPANY.

Supreme Court, North Carolina, November, 1898.

CARRIER AND PASSENGER — TRESPASSER — ALIGHTING. — Where there was conflicting evidence as to whether the plaintiff was stealing a ride or was a passenger and mistook the conductor's signal to jump from a flat car when the train was slowly moving by plaintiff's station, a charge that in either case the plaintiff could not recover was proper (1).

APPEAL from judgment, Superior Court, Iredell County, in favor of plaintiff.

CHARLES PRICE, G. F. BASON, and A. B. ANDREWS, JR., for appellant.

ARMFIELD & TURNER, for appellee.

1. For actions relating to ALIGHTING FROM AND BOARDING TRAINS, ETC., in the several State and Federal courts, from the earliest period to 1896, see vols. 2-7, AM. NEG. CAS., where the same are chronologically grouped and arranged in alphabetical order of States. The *North Carolina* cases are reported in vol. 6, AM. NEG. CAS. For subsequent actions see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

FURCHES, J. — The facts disclosed by the trial of this case strongly impress us with the belief that the plaintiff was not entitled to a verdict in his favor. At the same time, we cannot say that there was not evidence that entitled him to go to the jury, and, if believed, to a verdict; and we cannot review the findings of the jury, however much we might differ with them. But we will say that, outside of all the evidence on the part of the defendant contradicting the evidence offered by the plaintiff, it was not a very reasonable statement that if the plaintiff paid his fare from Salisbury to Statesville, as he says he did, he would have ridden all the way from Salisbury to Statesville in an open coal car, early in the morning of December 23d (only two days before Christmas), when he was entitled to a comfortable seat in the caboose. But if there is error in the findings of the jury, as we have said, they cannot be corrected in this court, unless the judge who tried the case committed an error of law on the trial. If this were so, and a new trial ordered on that account, this would vitiate the verdict; but it would not be because we have the power to review the findings of the jury, or had done so; and, upon a careful examination of the record, we find no error in law committed by the court below on which we can give a new trial.

There are several exceptions taken by the defendant, and, while none of them are formally abandoned, the defendant, in its brief, discusses but one of them. The issues submitted are as follows: "1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. Yes. 2. Was the plaintiff guilty of contributory negligence? A. No. 3. What damage is the plaintiff entitled to recover by reason of said injuries? A. \$500." For the purpose of sustaining the plaintiff's contention, the plaintiff testified that he paid his fare as a passenger from Salisbury to Statesville on the defendant's freight train, leaving Salisbury early in the morning of December 23, 1896; that he rode in an open box car used for hauling coal, where he could be seen and was seen; that he only paid his way from Salisbury to Cleveland station, and at Cleveland he paid his fare from that place to Statesville; that, when the station whistle sounded at Statesville, the train "slowed up" to three or four miles an hour, and the conductor, from the window of the caboose, signaled him to get off, and, in attempting to do so, he slipped, caught his foot in the stirrup, and was injured. He was corroborated by other testimony as to the conductor's giving the signal by the wave of the hand, and as to the fall and injury. All this evidence was flatly contradicted by the engineer and crew of the train. But, still, it was evidence for the jury, which they might believe, and did believe. It would seem that the defendant thought

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it material, if believed, as it offered evidence to contradict it. But, whether the defendant thought it material or not, it was material if believed, and the court could not say it should not be believed. As to whether it should be believed or not was a question for the jury alone.

Upon this evidence, the defendant's first prayer for instructions, and the only one discussed in the brief, was that, upon all the evidence, the court should instruct the jury to find the first issue, "No." The court refused to give this prayer, and committed no error in doing so. Had the court given this prayer for instruction, it would have been deciding upon the credibility of witnesses, the weight of the evidence, and the facts in the case, and would have been in direct violation of section 413 of the Code. This prayer is, in effect, a demurrer to the evidence, and admits, for the purposes of the prayer, that all the evidence is true. Such prayer can only be given in cases where the party asking the instruction is entitled to a finding upon the issue in his favor, taking all the evidence for the other side to be true, considered in the most reasonable light for the other side. *Baker v. Brem*, 103 N. C. 72, 9 S. E. Rep. 629; *Nelson v. Whitfield*, 82 N. C. 46; *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. Rep. 1. Taking the plaintiff's evidence to be true, he was a passenger on the defendant's train, and when it slowed up, he was told to get off, and was injured in so doing. This was negligence. *Lambeth v. Railroad Co.*, 66 N. C. 495 (1); *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. Rep. 426 (2).

We have examined the charge of the court, and find it full, fair and correct. The court, among other things, charged the jury that, if they believed (found) from the evidence that the plaintiff was stealing a ride, he could not recover, or if the conductor did make signals with his hand, not intended for the plaintiff, and the plaintiff mistook them, and undertook to get off the train, and was injured, he could not recover. We find no error in refusing the instructions asked, nor in the instructions given.

Affirmed.

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| 1. <i>Lambeth v. North Carolina R. R. Co.</i> , 66 N. C. 494, is reported in 6 Am. Neg. Cas. 93. | 2. <i>Hinshaw v. Raleigh & Aug., etc., R. R. Co.</i> , 118 N. C. 1047, is reported in 6 Am. Neg. Cas. 134. |
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WARD V. ODELL MANUFACTURING COMPANY.

Supreme Court, North Carolina, November, 1898.

NEGLIGENCE — WITNESS GIVING CONTRADICTORY EVIDENCE. —

The question of negligence is for the jury where more than one inference can be drawn from the testimony of a witness who first stated facts constituting negligence and afterwards made an entirely inconsistent statement.

MASTER AND SERVANT — VICE-PRINCIPAL. — An employer is liable for injuries to a child employed in a factory who was struck by a piece of flying wire cut under directions of a vice-principal, by an employee on a bench that stood in a part of the room near which the child had to pass in attending to his duties.

APPEAL from judgment, Superior Court, Iredell County, in favor of defendant.

ARMFIELD & TURNER and **H. P. GRIER**, for appellant.

LONG & LONG and **W. J. MONTGOMERY**, for appellee.

MONTGOMERY, J. — This action was brought by an infant of eleven years, through his next friend, to recover damages of the defendant for a personal injury alleged to have been suffered by the plaintiff through the negligent keeping and use of a workbench and tools by the defendant in the manufactory where the plaintiff was employed. In the building of the defendant company in which was manufactured its goods, there was, at the time of the alleged injury of the plaintiff, a very large room, divided into two well-defined sections, but by an imaginary line, each section being under the control of a superintendent, who was called a "boss," and who supervised the machinery and controlled the employees. The plaintiff worked under the supervision of Ward, one of the section bosses, his business being to carry quills from the looms to the quillers; and the workbench at which the plaintiff alleged he was injured was in the corner of the room, and in the section under the control of Suter, another section boss. Upon the workbench were nippers, and also a cold chisel and hammer and other tools, with which wires were cut to be used in the business of the defendant. The plaintiff testified on the trial below that, on the day he was injured, the quill carrier in Suter's section was sick, and that he was instructed by Ward to do the work of the other boy in addition to his own, and that his duties took him all over the room; that, in carrying quills to the quiller room, he had to pass about five feet from the bench, and between a loom and the bench. He said he could have gone up the middle of the room, but it would have been much further; that at the bench they would

cut wires by setting the cold chisel and then hit it with a hammer; that he did not know there was any danger in passing the bench; and that while engaged in his work and as he was passing, a piece of wire flew from the workbench, and struck him in one eye, inflicting a serious injury.

The main contention of the plaintiff's counsel was that the defendant was negligent in allowing the workbench and tools, and the work thereon and therewith to be carried on, in its manufactory, so close to the passway, along which the plaintiff and other employees were compelled or permitted to go in the discharge of their duties, as to make it dangerous to pass by while the work was going on. Another contention of the plaintiff was that, even if the act of the defendant in keeping the workbench and tools and the use of the same for the purposes described by the witnesses was not in itself negligence, yet that the manner in which the tools were used on the occasion when the plaintiff was injured was imprudent and negligent.

His honor instructed the jury on these points as follows: "I will tell you that the mere having and maintaining of the workbench and those tools used for the purposes for which witnesses say they were used was not in itself negligence, because the evidence shows that the bench could have been operated, and the work necessary to be done upon it could have been performed, without injury to anyone if proper precautions had been taken." We think that there was error in that instruction, and that the error arose from his honor's inadvertence to or misunderstanding of a part of the evidence. The evidence on this point was not all one way. There was evidence tending to prove that it was dangerous to cut wires on the bench with either chisel or nippers. The witness Ryan said that nippers were furnished by the defendant with which to cut the wires, and that, if nippers were used, wires would not fly out. The witness Wood said "that wires were cut with nippers which always stayed on the bench, and that there was no danger in using nippers." But Suter, who was the boss in charge of the section in which the bench was, said: "We did not allow the boys to work around the workbench. There would be danger in a boy's being around while wire is being cut. Fragments are likely to fly off in cutting wire with nippers." It is true that this witness (Suter) also said "that the proper way to cut wires was with nippers, and that the company furnished nippers for that purpose; and he also said he did not think there was any danger in cutting wires with nippers, — a statement inconsistent with his first statement. Whatever effect that inconsistency may have had upon his evidence, he unmistakably said that fragments were likely to fly off in cutting wires with nippers, and

the jury ought to have been allowed to say whether or not such flying off of fragments of the wires from being cut with nippers was dangerous, under the particular circumstances of this case.

Negligence is not a pure question of law, unless from the evidence a reasonable person could draw only one inference as to whether it existed or not. *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. Rep. 111 (1). In *Ellerbee v. Railroad Co.* (N. C.) 24 S. E. Rep. 808, the court said: "It is the province of the court, where the facts are undisputed, or where but a single inference can be drawn from the testimony, to instruct the jury whether either of the parties has been negligent, and what culpable act must be deemed the proximate cause of an injury. Where the facts are in dispute, or more than one inference might be drawn from the testimony by fair-minded men, it is the duty of the court to instruct the jury, when requested to do so, whether, in any aspect of the case arising out of the testimony, the acts of either party would constitute culpable carelessness; but in such cases it is always the province of the court to tell the jury that they are to determine whether, under all the circumstances, the party charged with culpability acted as would the ideal prudent man, and to make their verdict depend upon their decision of that question."

His honor further instructed the jury that "the mere having of the workbench and the tools in the room, apart from other considerations, would not amount to negligence in itself; and if you find that the workbench and the tools were used in a proper and prudent manner, as I will hereafter explain, then you will answer the first issue 'No,' in favor of the defendant." A part of the explanation of that instruction was as follows: "If you find that the safe way to cut wire was with nippers, and the defendant furnished nippers for the cutting of the wire, and the witness Ryan used the chisel to cut the wire, and by so doing hurt the plaintiff's eye, it was the negligence of Ryan (a fellow-servant), for which the defendant would not be liable, and you should respond 'No' to the first issue, unless Wood, as the representative of the company, was responsible for this negligence, as I will hereafter explain." If we are right in our conclusion that there was error in the first instruction pointed out, then the same error appears in the last instruction. His honor assumes that the cutting of the wires with nippers was a safe way to cut them. As we have said, the evidence about that matter was conflicting, and it should have been left to the jury for their finding.

1. *Tillett v. Norfolk & W. R. R. Co.*, 118 N. C. 1031, is reported in 6 Am. Neg. Cas. 128.

But, besides that, there was further error in the last instruction. According to the testimony of the defendant's witness Suter, it was the duty of Wood, another boss of a section, and himself, to do this work. He said: "Wood and I had control of this room, employees, and machinery. Workbench there for making picking sticks and filing up chains. It was the duty of Wood and myself to do this work. The boys did go and do this work. If they wanted to use hammer and chisel for the purpose of cutting wires, they were there for that purpose." And J. Carter, another witness for the defendant, said he was a loom fixer, and that he never used a chisel for small wire, but used it for cutting large wire. That evidence tended to show that the defendant put the chisel and wire upon the bench for the purpose of having the wires cut with it, as well as with the nippers; and the matter ought to have been submitted to the jury under instructions that, if they believed that testimony, they ought to find that the injury to the plaintiff was caused by the defendant's negligence, and not by Ryan's, — that is, if they believed from the evidence that Suter was a vice-principal of the defendant, and that he had instructed Ryan to cut those wires, under the evidence in this case.

We think the issues as submitted were sufficient; that the burden of proof to show negligence was on the plaintiff (*Hudson v. Railroad Co.*, 104 N. C. 491, 10 S. E. Rep. 669); and that the charge of his honor on the law governing negligence, as applicable between employers and employees of tender years, was correct, and substantially what the plaintiff requested him to charge. For the errors pointed out, however, there must be a new trial.

KUHNERT V. ANGELL.

Supreme Court, North Dakota, December, 1898 (1).

HORSES COLLIDING WITH WIRE FENCE ERECTED ACROSS TRAIL BY DEFENDANT'S WORKMEN. — 1. To support a verdict for damages for injuries done to a team of horses and other property, caused by colliding with an unlawful obstruction upon a well-defined trail, traveled for more than one year, under section 7550, Rev. Codes, there must be some evidence connecting the defendant with the doing of the unlawful act causing the injury.

1. Rehearing denied January, 1899.

2. Where it appears that defendant, for his principal, and pursuant to his request, employed a third person to build a fence around certain unoccupied land for which defendant was agent, and had such fence built by a third person, and the latter, in violation of defendant's instructions, and without his knowledge, erects an unlawful fence across such trail, and injury results therefrom, defendant is not liable, under the section above referred to.

(Syllabus by the Court.)

APPEAL from order of District Court, Cass County, granting a new trial after verdict had been rendered for plaintiff.

JOHN E. GREENE, for appellant.

A. B. LEE and BENTON & BRADLEY, for respondent.

YOUNG, J. — The plaintiff, who is the proprietor of a livery stable in the city of Fargo, obtained a verdict in this case in the District Court for injuries done to one of his teams, and other attendant and consequent injury, resulting from its being driven into a barb-wire fence, placed across what he designated as a "trail," the fence not having the protective guard rails which the law requires at such places. Defendant was the agent for the owner of the land where the accident occurred. The defendant made a motion for a new trial, which was granted. Plaintiff appeals. We think the motion for a new trial was properly granted, and find it necessary to refer to only two of the several grounds upon which the motion was based. At the close of the case, the defendant asked for a directed verdict, stating, among other grounds, this: That the evidence failed to show that the defendant had any direct connection with the work himself (that is, the building of the fence causing the injury). Insufficiency of the evidence to justify the verdict was also urged in the motion, one of the particulars specified being in the following language: That "there is no evidence in this case which shows or tends to show that the defendant, as agent for the owner of the land, on the line of which the accident occurred, was guilty of any act of nonfeasance, either towards his principal or the public." It appears that, early in 1896, George B. Hunt, who was the owner of the land where the accident occurred (which we may add was an unoccupied tract, having no buildings upon it, and mostly in timothy meadow), requested defendant, who for several years had managed it, attended to leasing it, and otherwise looked after the owner's interest, to build a fence around it. Pursuant to the direction received from Mr. Hunt, the defendant employed a Mr. Stenso to erect the fence. The latter did so, and was paid for it upon its completion, by the defendant, on July 1, 1896. This fence consisted of three strands of barbed wire, attached to cedar posts. It

crossed what, for the purposes of this decision, we will treat as a well beaten trail, traveled for the length of time necessary to bring it within the meaning of the statute. No board, pole or other suitable protection was placed on the fence where it crossed the trail, as required by statute. On the night of July 13, 1896, at about eleven o'clock P. M., plaintiff's team, driven by a person to whom he had hired it, in following this trail ran into the fence, resulting in the injury complained of. Plaintiff brings this action under section 7550 of the Revised Codes, which is as follows: "Every person who shall knowingly and wilfully obstruct or plow up, or cause to be obstructed or plowed up, any public highway or public street of any town, except by order of the road supervisors for the purpose of working the same, or injure any bridge on the public highway, or shall build or place a barbed-wire fence across any well traveled trail, which has been the usual and common route of travel for not less than one year prior to the commission of the offense; without placing on the outside of the top tier of barbed wire on said fence, a board, pole or other suitable protection, to be at least sixteen feet in length, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding one hundred dollars, and shall be liable for all damages to person or property by reason of the same." The plaintiff does not seek to recover from the defendant on the ground that the latter was negligent in not properly protecting the public against injuries which might result from the unsafe condition of the property intrusted to his care by Mr. Hunt, and that this was the cause of the injury. He sues under the statute above quoted, and to entitle him to recover the facts must be sufficient to sustain a verdict under that statute. The section referred to is found in the Penal Code. It makes one who knowingly and wilfully places or builds a barbed-wire fence, without the protection features, across a well-traveled trail, which has been in common use for at least one year prior to the act of building, guilty of a misdemeanor, and punishable by a fine. In addition, such person is made liable for damages. To recover under this statute, the plaintiff must show that the defendant built or placed an unlawful obstruction across the trail, in the form of a fence, without the necessary protection which the law requires, and this knowingly and wilfully. We do not mean to say that the defendant must have actually done the work himself, but he must have been associated or connected with it in some manner, other than by inference, so as to make him an actor in wilfully and knowingly doing the unlawful act. Not only is there no evidence in the case tending to show that the defendant assisted in building

or placing the unlawful fence across the trail, actually, by direction or otherwise, but it does appear affirmatively, and is not disputed, that the defendant directed the party who actually built the fence to place guard rails upon it at the crossing of this trail; further, that, at a later time, when the fence needed repairing at this point, he reiterated the same directions. It also appears that the defendant was not aware that these directions had not been complied with, until after the accident. The defendant, therefore, having directed the building of a lawful fence, cannot be held liable, under the statute, upon inferences drawn from the fact that he was the agent of the owner of the land. Upon the two grounds before indicated, the District Court properly granted a new trial. That order is affirmed. All concur.

CAMERON V. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, North Dakota, November, 1898.

PRACTICE — MOTION TO DISMISS TANTAMOUNT TO DEMURRER. —

A motion to dismiss, made at the close of plaintiff's evidence, is tantamount to a demurrer to the evidence, and in such cases everything which the jury might reasonably infer from the evidence is to be considered as admitted. In the light of this established rule of practice, *held*, under the evidence, that it was error to withdraw this case from the consideration of the jury.

MASTER AND SERVANT — SAFE MACHINERY AND APPLIANCES TO BE FURNISHED EMPLOYEES AND TO BE KEPT SAFE — STEPS OF PASSENGER CAR BROKEN AND CAR USED IN THAT CONDITION — CONDUCTOR'S BODY FOUND ALONGSIDE TRACK — PRESUMPTION. — Employers are bound to furnish reasonably safe and adequate machinery and appliances for the use of their employees; and if the employer negligently fails in the performance of this duty, and the employee is injured thereby while in the exercise of due care, the master will be liable; and when such machinery, etc., is safe and adequate when furnished, the employer is bound to exercise due care in keeping it safe, and to this end seasonable inspection and repairs thereof are required of the employer. Under the evidence in this case, *held*, that whether these duties have been performed by the defendant, with respect to the decedent, was a question of fact for the jury.

Held, further, that the question of whether the decedent, as an employee of defendant, assumed the risk involved in taking charge of the train in question, in the condition it was then in, was a question of fact for the jury, under the evidence.

Held, further, under the evidence, that it was a question for the jury to determine whether the defendant was guilty of the negligence charged in the complaint, and also whether such negligence, if shown to exist, was the proximate cause of the injury complained of.

Held, further, in view of the evidence, that the question of whether any negligence of the deceased contributed to his death was a question of fact for the jury (1).

1. *The following are some cases in point:*

In *HUGHES v. LOUISVILLE AND NASHVILLE R. CO.* (*Court of Appeals, Kentucky, November, 1898*), 48 S. W. Rep. 671, it was held error to give a peremptory instruction for defendant in an action for the death of a brakeman where it appeared that just after the brakeman was seen descending a ladder on the side of a caboose crossing a bridge a crash was heard as from the breaking of glass, and the conductor, looking out of the caboose window, saw him lying across the track in the rear of the moving train; that a strip from his trousers was found on the bridge and some lint from his clothing was found adhering to a girder of the bridge; that the space between the ladder and the inner edge of the girder was about seventeen inches and there was evidence of an experienced brakeman that a man in descending the ladder while passing through the bridge would probably be struck by the girder.

In *MCLANE v. PERKINS* (*Supreme Judicial Court, Maine, August, 1898*), 42 Atl. Rep. 256, it appeared that a party of men, employees of defendants under direction of one of the latter, launched two small boats early in the morning when it was quite dark for the purpose of going after some logs to be used in defendant's sawmill. The first boat arrived at its destination, the second, in which were four men, one being the plaintiff's intestate, did not arrive and was not seen again for some days afterwards, when it was found on the shore. Neither of the

four men was afterwards seen alive and their drowned bodies were found at intervals at different places on the river. The boat was an old punt with a crack along one of its sides which had been caulked with waste. The plaintiff contended that the drowning was the result of the unseaworthiness of the boat. The court held that the absence of contributory negligence was not to be presumed. "If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely to be careful in danger."

In *RAY v. CITY OF POPLAR BLUFF* (*April, 1897*), 70 Mo. App. 252, it appeared that the boards of a footpath on one side of a bridge had been taken up for repairs, and the evidence showed that the body of the deceased was found in the river 600 feet below the bridge two days after her disappearance and that her clothing was torn; that the body was that of a woman who was seen crossing the bridge on the evening of the disappearance of deceased and a witness testified that just after such person was seen he heard something fall into the water and then saw some person struggling in the river. A bunch of human hair about the color and length of that of deceased was found on a nail that projected from one of the stringers at the bridge opening which at this place was from sixteen to seventeen inches wide and from the sides of which the dust seemed to have been brushed.

Held, in deference to the instinct of self-preservation, that, in a case where there is no eyewitness of an accident resulting in death, a person who has suffered death by a railroad accident will be presumed to have been in the exercise of due care at the time, until the contrary is made to appear by evidence.

PRACTICE — APPEALABLE ORDER — JUDGMENT IRREGULAR IN FORM. — At the close of plaintiff's evidence, the trial court, on motion of defendant's counsel, made an order dismissing the action for failure of proof. Plaintiff served notice of appeal from said order. *Held*, on motion to dismiss the appeal, made in this court, that said order was neither a judgment nor an appealable order and hence, that the attempted appeal from such order was abortive.

There was also evidence that deceased said that she was going across to the west portion of the city. *Held*, that the question whether deceased fell through the opening was for the jury.

In *CORDELL v. N. Y. CENTRAL AND H. R. R. Co.*, 75 N. Y. 330, an action for death from collision with a train, the court said on p. 334: "Now, suppose, under these circumstances, he had been found killed there, no human eye having witnessed the accident, could the plaintiff have recovered? We think not. There would have been no evidence from which a jury could justly have inferred that he used such care to avoid the danger as the law requires. A jury could not have indulged in the speculation that he looked both ways, and that 'the train stole down upon him' unawares and killed him."

In *KENNEY v. N. Y. AND MANHATTAN BEACH R. R. Co.*, 13 N. Y. Wkly. Dig. 61, the deceased walked on or near a track upon which defendant was making a flying switch with its cars. No one saw the accident. The court said where the circumstances point as much to negligence upon the part of the deceased as to its absence or point in neither direction, a recovery cannot be had.

In *RICEMAN v. HAVEMEYER*, 84 N. Y. 647, it appeared that the deceased was at the time of his death an assistant engineer in defendant's sugar refinery. In the basement were two rows of

tanks with a flagged passageway two feet six inches wide between them. At one point a gutter ran across the passageway, a foot above it, with a block on either side to assist in getting over it. The deceased, while passing over the passageway, fell into a tank containing hot syrup and received injuries causing his death. No one saw the accident. *Held*, the plaintiff could not recover, as she failed to show directly or inferentially that her testator was free from contributory negligence.

In *TOLMAN v. SYRACUSE B. & N. G. R. Co.*, 98 N. Y. 198, an action for the death of plaintiff's intestate who was killed on a dark and stormy night by a train hitting the wagon in which he was driving over a crossing, the court said: "The burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eyewitnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or wilful disregard of personal safety, and so a question of fact may arise to be solved by a jury, and require a choice between possible, but divergent, inferences. If, on the other hand, those

Such order was entered, without any change of its form or terms, in the judgment book of the clerk of the District Court. The order concluded as follows: "The plaintiff's action is hereby dismissed. Done in open court this 8th day of December, 1897." *Held*, in view of the explicit language of the order dismissing the action, that while the same, considered as a judgment, is irregular and highly improper in form, it nevertheless embodies the final judicial determination of the action made by the trial court, and, being duly entered in the judgment book, is sufficient, in substance, as a judgment.

(Syllabus by the Court.)

facts and circumstances coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable."

In *FITZGERALD v. N. Y. C. & H. R. R. Co.* (*Supreme Court, New York, January, 1895*), 55 N. Y. Supp. 1124, the jury were warranted in finding that death of a brakeman was caused by a bridge where the evidence was that just before the train passed under a low bridge, four or five feet above the top of a car the brakeman was standing on it in apparent good health and that after it passed under he was found on top of the car with the back of his head crushed in.

This was the third time the case had been tried and appeal taken. On the two previous trials the verdict was \$3,000 each time. On the third trial \$3,500 was awarded. An appeal was taken to the Court of Appeals on the 2d trial — 154 N. Y. 263 — where the judgment was reversed on the ground that there was no evidence of any wound on the body of deceased.

In *SCHUM v. PENN. R. Co.*, 107 Pa. 8, it was held that where there is absolutely no evidence as to how the accident occurred the presumption is that the deceased was in the exercise of due care.

In *COX v. NORFOLK AND CAROLINA R. Co.* (*Supreme Court, North Carolina, December, 1898*), 31 S. E. Rep. 848, an action for damages for a death, it was held that a nonsuit had been improperly granted where it was admitted that deceased had been killed by a train and it appeared that no one saw the accident, which occurred on a bright moonlight night; that a witness found the body of the deceased about midnight lying across the track; that the same witness saw a train pass about two hours before, but that he heard no bell or whistle though only two hundred yards from the train; another witness testified that he examined the body as it lay on the track, and that it was in the track and near a public footpath, that was the usual path to the house of deceased, and the way he always walked; that a person could easily be seen near the path on that night from the depot; that from the evidence of an expert engineer the body was found two hundred and fifty feet from the depot, and there was no obstruction between the depot and the path, and that if a man was keeping a lookout he could see a man on the track for one hundred yards on a bright moonlight night, and that if a train was moving four miles an hour it could have been stopped in fifteen feet or at eight miles an hour in thirty feet, and there was testimony tending to show that the deceased had been drinking.

APPEAL from judgment, District Court, Grand Forks County, in favor of defendant.

BOSARD & BOSARD, for appellant.

W. E. DODGE and BURKE CORBET, for respondent.

WALLIN, J. — This action is brought by the widow of Edward James Cameron to recover damages for the alleged negligence of the defendant in causing the death of the said Cameron. The action was tried to a jury, and at the close of the plaintiff's evidence the case was withdrawn from the consideration of the jury, and the action dismissed. This ruling is assigned as error in this court, and the only question that need be determined here is whether such ruling was error.

There is little dispute in the evidence as to the existence of the determining facts of the case. The record shows that the decedent was at the time of his death a passenger train conductor in defendant's employ; that on the 17th day of November, 1894, he was killed by falling or being thrown from the passenger train of the defendant then in his charge as conductor; that such accident occurred in the county of Grand Forks, N. D., about midway between the station of Arvilla and the next station, situated about seven miles east of Arvilla, and named "Emerado." The train was east bound, and was the regular Pacific passenger train, consisting of nine cars, and running between Seattle, Wash., and St. Paul, Minn. The accident occurred between 6:43 and 6:52 P. M., and at a time when the train was running at a high rate of speed. The train reached Grand Forks at 7:25 P. M., and there the conductor was missed; and, on being searched for, his body was found at the place above indicated. The evidence shows that the right shoulder of the deceased was crushed down, and one of his arms broken. His skull was also broken. A physician testified that death resulted immediately, or almost immediately, as a consequence of said injuries. The deceased had taken charge of the train at Minot, N. D. It appears that the deceased was seen alive just after the train passed Arvilla; and there is evidence tending to show that a very few minutes before the accident the deceased was seen in the rear sleeper, the last car of the train, passing through the car, towards the rear end of the car, but no witness testifies to having seen him pass out of the back door of the car and onto the rear platform at that time, or at all that day. It appears that the train in question, while backing into the station at Great Falls, Mont., met with an accident whereby the steps leading to the platform were broken, which steps were located at the rear end, and on the left and north side, of the last car in the train, which car was a sleeper, and was the same car on which the deceased,

so far as shown by the evidence, was last seen alive. The rear platform of this sleeper was about five feet wide across the car, and about three feet the other way. Counsel, in discussing the case in this court, have assumed that the rear end of a platform on the last car of a passenger train is supposed to be guarded by a chain, which is so made that it can be fastened and unfastened; but the evidence in this case fails to show whether there was or was not such a chain on this car. After the steps had been broken, and before the train left Great Falls, Mont., the broken steps were removed by the employees of the defendant, and the bolts which fastened the steps were laid on the rear platform of the sleeper; and the car came east in the train, and continued to be the rear car, and said steps were absent and not on the car at any time until after it reached Grand Forks, N. D. The evidence fails to disclose whether the defendant has a car shop or other facilities for the repair of its cars at any point on its line between Great Falls, Mont., and Grand Forks, N. D.; but the evidence tends to show that similar accidents to car steps had occurred with some frequency in the mountains between Seattle, Wash., and Helena, Mont., during the years 1893 and 1894, and that, when steps were so broken and removed at any point between the Pacific Coast and St. Paul, it was not the custom of defendant to take out the car for repairs while in transit. It is claimed that the deceased, having been in defendant's employ for some years prior to the accident, is chargeable with knowledge of this custom of the defendant in this particular, and voluntarily assumed any risk which such custom involved. Reverting to the rear platform in question, it appears that there was an iron gate, some three and one-half feet high, which, when closed, shut in the platform on the sides, and prevented ingress or egress to the sleeper by way of the steps leading to the platform. These gates swing from the car to the railing, — swing out to close, and in to open. The hinge makes the fastening for the gate. There is one hinge on the gate, and one on the car, and also another hinge halfway between. As the gate closes, the hinge straightens out, and as it is opened the hinge closes at an angle; and it is not possible, without raising the hinge, to open the gate. But it appears that these gates may, when fastened, be opened by applying the hands to the gate, and are ordinarily so opened and shut. The gates, when closed, are inside the steps, so that a person on the platform could not pass down the steps without first opening a gate. A passenger from Helena, who occupied the rear sleeper, testified that he was on the rear platform between three and four o'clock in the afternoon of the day of the accident, and while there noticed the absence of the car steps, and

also that the gates were at that time closed. This passenger found the back door of the car unlocked when he passed out upon the rear platform. This witness was on this car, and heard the noise caused by breaking the steps, and learned while at Great Falls that the steps were broken. It is not claimed that the gate on the north side of the rear platform was, after the steps were removed, securely fastened, so as to wholly prevent its being used or opened while in transit to St. Paul. The theory of the complaint is that after the steps were removed the car was defective, inadequate, and unsafe as a car, to the knowledge of the defendant, and might have been made safe by the defendant by the use of ordinary care, viz., by securely fastening the north gate on said rear platform, which gate, the complaint alleges, "could have easily and conveniently been rendered safe, which fact was well known to the defendant, but the defendant neglected to cause said gate to be closed and fastened." The complaint avers that the deceased was unaware of the unsafe and defective condition of the car, and that while he was in the discharge of his duties as conductor of said train, and by reason of the alleged unsafe and defective condition of said car, and without negligence or fault on his part, he was cast upon the ground, and there killed. The body of the decedent was found on the north side of the track of the railroad, and in the ditch. Several articles belonging to him, including his lantern, ticket punch, certain change and pocket pieces, were also found near the body. These articles were scattered along the ground, west of the body, for a distance of ten or fifteen feet therefrom, and all of the same were found on the north side of the railroad track. The ticket punch was found some four or five feet north of the track. There was no eyewitness of the accident, and no witness attempts to testify directly as to how the deceased fell or was thrown from the train.

In this state of the evidence, counsel for the appellant insists that it was error to take the case from the jury. In disposing of this assignment of error, it is well settled that conflicts in the evidence upon material points must be disregarded, and the whole evidence is to be construed most favorably to the party against whom the ruling is made. The defendant's motion to dismiss was, in effect, a demurrer to the plaintiff's evidence, and upon such demurrer the Supreme Court of the United States declares the rule as follows: "On a demurrer to evidence the court is substituted in place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted." *Bank v. Smith*, 11 Wheat. 171. This court has had frequent occasion to apply this well-settled rule of practice, and has often emphasized.

the importance of exercising great caution in taking a case from the jury. See *McRea v. Bank*, 6 N. D. 353, 70 N. W. Rep. 813; *Vickery v. Burton*, 6 N. D. 253, 69 N. W. Rep. 193. The test is whether there is any competent evidence in the case reasonably tending to sustain the cause of action alleged; and, if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case, it is error to withdraw the evidence from the consideration of the jury. This case must be governed by this rule.

It is well settled that the master must furnish the servant with reasonably safe and suitable machinery and appliances, and if the master fails in this duty, and the servant is injured thereby while in the exercise of due care, the master will be liable for such injury. The master is bound to observe all the care which prudence and the exigency of the situation require, with respect to furnishing instrumentalities adequately safe for the use of the servant, and, when such instrumentalities are furnished, the master is required, further, to exercise due care in keeping the same safe and serviceable; and, with this end in view, the master is bound to make seasonable inspection of the condition of the instrumentalities furnished for the use of the servant. These rules are familiar, and are so frequently reiterated by the courts that authority in their support is unnecessary; but see 2 *Thomp. Neg.* p. 972; *Wood, Mast. & S.* sec. 329; *Brann v. Railroad Co.*, 53 Iowa, 595, 6 N. W. Rep. 5; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Railroad Co. v. Jackson*, 55 Ill. 492; *Hough v. Railroad Co.*, 100 U. S. 213; *Buzzell v. Manufacturing Co.*, 77 Am. Dec. 212, and notes at end of the case. These authorities show also that the deceased was not a fellow-servant with other servants in the defendant's employ, whose duty it was to provide and inspect the cars furnished for the use of conductors, in the sense that the defendant would not be liable for the neglect of such other servants in furnishing adequate cars and appliances to the deceased for use in the defendant's railroad operations.

In the light of these authorities, the inquiry is presented whether the rear sleeper in question, with the steps thereof removed as before explained, was, when delivered to the deceased in Minot, in a safe condition, and especially was it a safe and adequate instrumentality, with reference to its use by the deceased as a train conductor. In view of the fact that the evidence fails to show that the defendant had facilities for repairing its cars broken in transit elsewhere than at the termini of its line, St. Paul and Seattle, we should be inclined to hold that it was not negligence on defendant's part to

send the sleeper in question to St. Paul, as a part of the train to which it was attached when broken. But the ulterior inquiry is whether, after the defective condition of the car became known to the defendant, and the defendant's employees had detached the steps, as they did at Great Falls, Mont., it was an act of negligence to deliver the car to the deceased in its broken condition, without first securing the gate on the north side of the rear platform in such a manner as to wholly prevent the egress of persons within the sleeper through said gate. This could have been easily and quickly accomplished by the defendant's employees who removed the steps. It was not done, and we are of the opinion that it was a question of fact whether the omission constituted an act of negligence on defendant's part.

But counsel for the respondent further contends — and this most strenuously — that, if defendant's negligence be conceded, the evidence in the case fails to show that the death of the decedent resulted from such negligence. In other words, counsel claims that the negligence complained of does not appear to have been the proximate cause of the injury alleged, in this, that the evidence, as counsel claims, does not show that the deceased was killed by falling through the opening made by removing the steps leading to the platform in question. Upon this point we quote from the brief of the respondent's counsel: "No reason is assigned or shown by the evidence for his visiting that platform, and, having once reached it, he may have been engaged in reaching under the end of the platform to adjust the air valves. He may have fallen or been thrown off the rear end of the platform, either over or under the chain-guard, or, in the absence of a chain-guard, may have been cast from the platform by tramps engaged in stealing a ride, or may have deliberately reached over, unfastened the gate, opened it, and stepped out upon the tracks. The evidence does not disclose to which of these causes his death was attributable, and the rule is well settled that, if it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery. The question must not be left to mere conjecture." In support of the rule of law contended for, counsel cites, among others, the case of *Koslowski v. Thayer*, 66 Minn. 150, 68 N. W. Rep. 973; also, *Moore v. Railway Co.*, 67 Minn. 394, 69 N. W. Rep. 1103, and other authority. The cases cited are not similar, as to their facts, to the case at bar, but the rule of law as announced in both of the cases is elementary; and in the case of *Koslowski v. Thayer* the court said in the syllabus "that there was no evidence furnishing a reasonable basis for the conclusion that the negligence

of the defendants was the proximate cause of the death of plaintiff's intestate." And in *Moore v. Railway Co.* the court gave the same reason for reversing the judgment entered in favor of the plaintiff. Both cases support the rule that a verdict must not rest on mere conjecture, and that, where the evidence is such that "it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery." Applying this rule, the question arises whether there is evidence in this case, either direct or circumstantial, upon which the jury could have reasonably inferred that the deceased lost his life in the manner alleged in the complaint; and the crucial test is whether intelligent and honest men, after carefully weighing the evidence, might fairly differ upon this question. We are of the opinion that the evidence and conceded facts in this record furnish a legitimate basis for the inference that the deceased was killed in the manner charged in the complaint, and that this inference has a stronger support in the evidence than either the conjectural theories of the accident which have occurred to us, or those which have been suggested by the learned and ingenious counsel for the respondent, and hereinbefore mentioned; and we feel very confident that, after considering the testimony, intelligent and honest jurors may have fairly differed upon the question whether the deceased did or did not lose his life in the manner alleged. It may be conceded — and that without violating physical laws or running counter to direct evidence — that there is a naked possibility that the deceased lost his life either by falling or being thrown off the end of the rear platform, or by falling or being thrown from the steps leading out of the car from the south side of the platform; but, as we have already said, these conjectural modes of death have, in our opinion, less support in the evidence than the manner of death alleged in the complaint. The skull of the deceased was found to be broken, and the expert testimony tends to show that he died from the effects of the accident immediately, or nearly so. This being the evidence, it would, we think, be incredible to suppose that the deceased, after falling from the train on the south side thereof, should have passed to the north side of the track, where the body was found, and carried with him his several belongings which were found near the body, and also on the north side of the track. And it is only a little less incredible, in our opinion, under the evidence, to suppose that, after being hurled to sudden death from the end of the platform, the deceased, taking all of said belongings with him, made his way to the north side of the track, and that not a single article belonging to the decedent was left behind upon either the center or south side of the

track. In our judgment, neither of these hypotheses finds much support in the evidence; and, on the other hand, the evidence, in our judgment, tends more particularly to support the theory of the accident pleaded by the plaintiff.

But counsel again contends that the conceded facts in the case tend to show that the negligence of the deceased, if he lost his life as alleged, contributed to the accident, and was itself the proximate cause thereof. If this contention can be sustained upon the record, the plaintiff cannot recover. But it should not be overlooked that negligence is a question of pure fact, and never becomes a question of law for the courts, unless the facts, and all legitimate inferences therefrom, are conclusively established. In this case the court having reached the conclusion that the evidence raises at least a probability that the deceased was killed in the manner alleged, we are next to inquire whether, at the time the deceased passed through the north gate, and onto the ground, to his death, he knew, or should have known, that the steps were removed. Under the evidence, we think the inference is legitimate that the decedent did not in fact know that the steps were removed and not in place when he passed out through that opening. The train was moving rapidly, and was then midway between stations. Under these circumstances, to have opened the door, even to look out ahead, would have been an act of great imprudence, if the decedent knew of the defective condition in question. We could not indulge such a supposition, unless the evidence and all the circumstances clearly indicated the existence of such facts as tend to show that the deceased did know of the defective condition of the car. But there is a presumption of law which furnishes a rule applicable to a case like this. The law, out of regard to the instinct of self-preservation, will presume, *prima facie*, that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care; and this presumption is not overthrown by the mere fact of the injury. *Flynn v. Railroad Co.*, 78 Mo. 195. See, also, *Adams v. Iron Cliffs Co.* (Mich.) 44 N. W. Rep. 270. In the absence, therefore, of an eyewitness to the accident, it is the duty of the court to assume, unless it is shown to the contrary, that at the time of the accident the party injured was in the exercise of due care. Plaintiff being entitled, under the authorities, to invoke in her aid the legal presumption of due care on the part of the deceased, the defendant, therefore, has the burden to overthrow such presumption by evidence sufficient to do so. This burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt. If, under the evidence, reasonable men may honestly differ,

the ultimate question is one of fact for the jury. As we have shown, the evidence as to the manner of the accident tends to show that the decedent did not in fact know of the absence of the car steps. The question, therefore, on this branch, is, was he bound to know the defective condition? Upon this feature we are confident that the question was one of fact, which should have been submitted to the jury, with instructions as to the *prima facie* presumption already referred to as applicable to cases of this kind. We are unable to see that this presumption has been overthrown by the evidence, or by the fact that the decedent was in charge of the train, as conductor. It does not appear from the evidence that the conductor actually visited this platform at any time during the day in question prior to the time he was killed; nor does it clearly appear that a train conductor would necessarily visit that particular platform in the discharge of his duties. We are clear that a court ought not to assume, as a mere question of law — First, that a conductor of such a train must necessarily go upon such platform in the discharge of his duties; and, secondly, being there, must necessarily have observed the absence of the car steps. The steps were not removed while the deceased had charge of the train. The car in question had been delivered to the care of the deceased as a part of a regular through passenger train. It would seem that the decedent would be justified in assuming, under the circumstances, until it appears that he actually discovered the defect in question, that the entire train was safe and adequate as a through train for the conveyance of passengers. A sleeping-car porter, who was on duty on the train throughout the entire trip, testified: "I do not know when the steps were removed from the rear end of the sleeper. Know nothing about it particularly. I knew they were off when we landed at Havre. Made no examination of the platform at the time." It is well known that the duty of a sleeping-car porter is to assist passengers on and off sleeping-cars, and yet this porter seemed to have been unaware of the absence of the steps until long after their removal; and, when their absence was discovered, he apparently paid little attention to the fact. This indifference of the porter may perhaps be explained further by another fact. The porter testified: "My instructions are to lock our rear doors, approaching all important stations. This is practiced at Grand Forks and Larimore. And we unlock the doors upon getting away from stations. The practice is to lock the rear door of the rear car, and the forward door of the forward car. One man has to go to the office to get his documents, and that is so one man can watch two cars, leaving the two doors open together." This evidence, we think, suggests a pertinent question of fact, *i. e.*,

whether the train conductor was aware of the custom of locking the rear door of a rear sleeper on approaching important stations, and, if so, whether it was an act of negligence on his part, under the circumstances, not to inspect said platform, and discover the defects in question. At least, we are clear that intelligent men might reasonably differ upon this feature of the alleged negligence of the decedent. The rules of law governing the question of contributory negligence have long since emerged from the realm of doubt. Primarily the question is one of pure fact, and where the evidence is either conflicting or fairly susceptible of different interpretations, or the inference from the evidence doubtful, the question is for the jury. The rule is the same where the evidence is undisputed, if different inferences therefrom may be fairly deduced by intelligent minds. We cite only a few cases from the mass of authority sustaining these propositions: *Railroad Co. v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. Rep. 557 (1); *Dunlap v. Railroad Co.*, 130 U. S. 653, 9 Sup. Ct. Rep. 647; *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. Rep. 797; *Payne v. Railroad Co.*, 83 N. Y. 572; *Adams v. Iron Cliffs Co. (Mich.)*, 44 N. W. Rep. 270; *Galvin v. Mayor, etc. (N. Y. App.)*, 19 N. E. Rep. 675.

A single question — one of practice — remains to be considered. The record shows that at the close of the plaintiff's evidence, and upon motion of the defendant's counsel, the trial court made an order dismissing the action. This order, after reciting the grounds upon which it is made, proceeds as follows: "Which motion, after being duly considered by the court, is allowed, and the plaintiff's action is hereby dismissed. Done in open court this 8th day of December, 1897." This record shows that the clerk of the District Court entered this order in the judgment book, and it appears that the order was filed with said clerk on August 5, 1898. The notice of appeal, served August 8, 1898, is in the following language: "Please take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of this State from the judgment of dismissal made in said action on the 8th day of December, 1897, and entered in the office of the clerk of the District Court on the 5th day of August, 1898, in favor of the defendant and against the plaintiff, and from the whole thereof." This order of dismissal, when made, was merely an interlocutory order, and its character as such is not affected by being misdescribed as a judgment in the notice of appeal. Under the statute governing appeals in this State, as repeatedly construed by this court, such orders are nonappealable orders. See *In re Weber*, 4 N. D. 119, 59 N. W. Rep. 523; Field

1. See this case reported in 7 Am. Neg. Cas. 359-368.

v. Elevator Co., 5 N. D. 400, 67 N. W. Rep. 147. See, to the same effect, *Locke v. Hubbard* (S. D.), 69 N. W. Rep. 588. But the notice of appeal also states that the plaintiff appeals from a judgment of dismissal in this action which was entered by the clerk of the District Court on the 5th day of August, 1898. An inspection of said judgment (a copy thereof being in the record) discloses that the same is a copy of the court's order of dismissal, and nothing different or additional thereto is contained in the same. The question is therefore presented whether this constitutes a judgment, within the meaning of the law. We are constrained to hold that it does. It embraces the disposition made of the case by the court below, and that disposition is incorporated in the judgment book. The language of the judgment is, "The plaintiff's action is hereby dismissed." This is explicit, and it is found written in the judgment book kept in the office of the clerk of the District Court. It is needless to say that this mode of entering judgment upon an order of dismissal is very slipshod, and not to be encouraged. Nor must we be understood as holding that an order simply directing that the action be dismissed would, if entered in the judgment book, operate as a judgment of dismissal. Upon this question no opinion is expressed.

For reasons already advanced the judgment is reversed, and a new trial is ordered. All the judges concurring.

HAUG V. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, North Dakota, April, 1898.

CARRIER AND PASSENGER — EXPULSION OF INTOXICATED PASSENGER FROM WAITING-ROOM — DEATH FROM EXPOSURE. — Defendant received plaintiff's husband as a passenger, but negligently carried him by his station. When the train reached the next station he was put off, against his wishes. He was in an imbecile and helpless condition from intoxication, and this was known to defendant's employees. It was late at night, and the weather was stormy and bitterly and dangerously cold. There were no proper accommodations for travelers at the place except defendant's depot, and shortly after entering the same to wait for a train to take him back to his destination, and while conducting himself quietly, he was ejected from the depot, and driven out into the night, with all its perils for a man in his condition. As a consequence, he died from exposure.

Held, that the defendant was liable in damages to his widow for his death (1).

(Syllabus by the Court.)

APPEAL from District Court, Traill County. There was a judgment for defendant on demurrer and plaintiff appeals.

B. E. INGWALDSON, for appellant.

W. E. DODGE, for respondent.

The ground of liability in this case is the disregard by defendant of human life while in the performance of a legal right. When

1. *As sustaining the conclusion reached the court cited, in its opinion, the following cases:*

RAILROAD CO. *v.* JOHNSON (Alabama), 19 Southern Rep. 51, where it appeared that plaintiff's intestate who was a passenger on one of its night trains, was very drunk, and refused to pay his fare. Thereupon he was ejected in a cut of the road where there was no escape, except up or down the track, along the sides of which there was room for a person to walk. The night was dark, and it was raining. At the south end there were cattle guards, which could be passed only by walking on the track. Here he was struck, and killed by a train. It was held that the company was liable. The court said: "If a passenger on a train is intoxicated to a degree to render him unconscious of danger, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place. *Tanner v. Railroad Co.*, 60 Ala. 621; *Isbell v. Railroad Co.*, 27 Conn. 393; *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172; *Railroad Co.*

v. Sullivan, 81 Ky. 624, 8 Am. Neg. Cas. 286, 50 Am. Rep. 186; *Johnson v. Railroad Co.*, 58 Iowa, 348, 8 Am. Neg. Cas. 241, 12 N. W. Rep. 329; *Kline v. Railroad Co.*, 37 Cal. 400, 8 Am. Neg. Cas. 58, 3 Wood, R'y Law, secs. 363, 364; *Shear. & R. Neg.*, sec. 493; 2 Am. & Eng. Enc. Law, 748."

In *Railroad Co. v. Pitzer*, 109 Ind. 179, 6 N. E. Rep. 310, and 10 N. E. Rep. 70, the court, referring to some of the cases already cited, said: "These are cases — extreme ones, it may be — illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness."

In *Brown v. Railroad Co.*, 51 Iowa, 235, 8 Am. Neg. Cas. 242, 1 N. W. Rep. 487, the court said: "In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised all the circumstances should be considered as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near

defendant negligently carried plaintiff past the station to which he was bound, it became liable to him for breach of its contract, and was under obligations to return him to that place without charge. But there is no connection between this negligent act and the death which thereafter resulted. Such act was not the proximate cause of his death. Had defendant carried him to a place of safety, and had he died from cold because of his intoxicated condition, no liability would have existed. Nor do we wish to be understood as holding that defendant was obliged to carry him without pay to any point to which he might express a desire to be transported. A traveler who buys a ticket at St. Paul for Minneapolis cannot, when negligently borne beyond his destination, demand that he shall be given a free ride to the Pacific coast. The railroad company has rendered itself liable for its breach of contract, but it has not incurred the obligation to carry the passenger any further than it would be obliged to carry any other passenger who has no ticket and refuses to pay his fare. The duty to carry the traveler, who has been taken past

to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place, and be prosecuted in such manner, as not unreasonably to expose the party to danger."

In *Railroad Co. v. Weber*, 33 Kan. 543, 6 Pac. Rep. 877, the court say, at page 554, 33 Kan., and page 884, 6 Pac. Rep.: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the case: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers, but, when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to ex-

ercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.' "

In *Railroad Co. v. Sullivan*, 81 Ky. 624, 8 Am. Neg. Cas. 286, 50 Am. Rep. 186, it was held that the defendant was liable when it expelled from its cars, because he refused to pay his fare, a passenger who was helplessly drunk, the defendant knowing of his condition, he being expelled, not at a station, but in the snow. As a consequence of this expulsion at such a place he was severely frozen, and the defendant was held liable therefor.

In *Conolly v. Railroad Co.*, 41 La. Ann. 57, 8 Am. Neg. Cas. 309, 5 Southern Rep. 259, and 6 Southern Rep. 526, the court said: "But none of those cases hold that this right of exclusion can be exercised inhumanly, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

In *Roseman v. Railroad Co.* (N. C.), 16 S. E. Rep. 768 (8 Am. Neg. Cas. 564ⁿ), the court said: "But where

his station through the negligence of the carrier, to a place where his life will not be imperiled, may perhaps be greater than the duty to a wilful trespasser, who is conducting himself with violence on the train. But, in a general sense, his right to continued transportation is no greater. He must either pay or leave the train when a point has been reached where he will not be exposed to great hazard. Plaintiff in this case cannot complain of the mere fact of the ejection of her husband from the train at Kelso. It is because of the peculiar circumstances surrounding that act, and which made it one necessarily dangerous to human life, when considered in the light of the subsequent conduct of defendant in forcibly removing him from its depot, that the plaintiff may justly hold defendant responsible for the terrible consequences which ensued. To have put him off the train where there were hotel accommodations would have been justifiable, because the defendant was not bound to carry him until he had become sober. Had he, after being ejected at such a place, been run over and killed in the street, or been frozen to death because of his state of intoxication, defendant could not be held responsible. But no one would contend that it could put him off from the train while in motion. And yet why is this so? The underlying principle applicable in such a case is that a railroad company

the power expressly given by law is exercised in such a manner as to wilfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood, R'y Law, sec. 362; 2 Shear. & R. Neg., sec. 493; *Railroad Co. v. Wright*, 68 Ind. 586."

In *Railroad Co. v. Valleley*, 32 Ohio St. 345, 8 Am. Neg. Cas. 567, the court said: "It might, perhaps, as far as this case is concerned, be conceded that, if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the

rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And, further, to put a man off in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction, this could find no justification in law. All this might possibly be."

For actions relating to EJECTION OF PASSENGERS FROM TRAINS, ETC., in the several States and Federal courts, from the earliest period to 1896, see vol. 8, AM. NEG. CAS., where the same are chronologically grouped and arranged in alphabetical order of States. For subsequent actions see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

must not, even when exercising the lawful right of removal, so act as to jeopardize human life. On the same principle, it could not set the passenger out in the midst of a storm on a cold night on the prairie or at a flag station. Neither would the law sanction its act in ejecting him under such circumstances at a station where there were no accommodations for travelers, and where the depot was closed. The defendant in this case owed to plaintiff's husband the duty of carrying him to a point where he, helpless from drink, would not be shelterless against the pitiless fury of a storm, on a bitterly cold night. Whether he was left on the lonely prairie between stations, or at a flag station where there was no depot, or at a village where he could not find shelter except at defendant's depot, which was closed to him or shelter in which was denied to him, the fact would in all the cases be the same, — that it had placed him, a man helplessly intoxicated, to its knowledge, and whom it had negligently carried beyond his destination, in a position from which death or great bodily injury was almost certain to result. The defendant could not expect that a stranger in a place, much less one in such a state of intoxication, would be permitted to enter a private house. It was chargeable with knowledge that his condition was such that he might not even have sufficient control of his faculties to make an effort to do so. The complaint shows with sufficient clearness that the death which resulted was proximately caused by the defendant's wrongful act. The order sustaining the demurrer is reversed. All concur.

Opinion by CORLISS, Ch. J.

MALPASS v. HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER RAILWAY COMPANY.

Supreme Court, Pennsylvania, January, 1899.

CARRIER AND PASSENGER — ATTEMPTING TO ENTER STREET CAR BEFORE BARRIER REMOVED. — A railroad company is not liable for injuries sustained by a person who attempted to enter a summer car that had reached the end of its run, and who mounted the running board, but could not enter because the barrier on that side had not been removed, and while in that position was struck by another car on the other track.

APPEAL from judgment of nonsuit of Court of Common Pleas, Philadelphia County.

A summer car upon the south track had reached the eastern end of its route, and was about to start westward in the reverse direction

upon the north track. It was not yet prepared to receive passengers. The preparation would consist in lowering the barrier upon the south side and raising that upon the north side. The plaintiff approached the car from the south side, and found that the barrier upon that side had been lowered preparatory to starting westward, when the south side would be the side next to the adjoining track. He then crossed the track at a point to the eastward of the standing car, which brought him to the north of the north track. After crossing, he turned, and faced the north side of the car. Just before crossing, he had seen a car standing on the same track twenty-five or thirty feet to the eastward of the car he desired to board, and that it was about to move in a westward direction so as to take the switch to the north track, and proceed westward along it. When he turned he saw that the barrier on the north side of the standing car had not been raised, but was about to be raised by the conductor and motorman. The plaintiff mounted on the running board with the barrier before him so that he could not enter the car until the barrier should be raised. While his progress was thus arrested by an obstacle which he had seen, he was struck by the other car, which had meanwhile traversed the switch, bringing it upon the north track.

CHARLES H. EDMUNDS, for appellant.

RUSSELL DUANE, J. BAYARD HENRY, and THOMAS LEAMING, for appellees.

PER CURIAM. — We find nothing in this record that would justify us in holding that the court below erred in refusing to take off the judgment of nonsuit. There is no evidence of negligence on the part of either of the defendant companies that required submission of the case to the jury. The plaintiff undertook to do what neither of them could reasonably be expected to anticipate, and they were not negligent in failing to provide against such an imprudent act.

Judgment affirmed.

SOWASH v. CONSOLIDATED TRACTION COMPANY (TWO CASES).

Supreme Court, Pennsylvania, 1898.

PASSENGER IN STREET CAR ALIGHTING FROM FRONT PLATFORM BY INVITATION OF MOTORMAN AND INJURED BECAUSE OF BROKEN GROUND. — A street railway company is liable for injuries to a passenger who at the invitation of the motorman alighted from the car

from the front platform on a dark night where the ground was broken, and after taking a few steps fell down, there being no proof of contributory negligence on the part of the passenger (1).

APPEALS from judgments of Court of Common Pleas, Allegheny County, in favor of plaintiffs.

GEO. C. WILSON, WM. D. EVANS, and M. W. ACHESON, JR., for appellant.

DAVID S. McCANN and J. L. RITCHEY, for appellees.

PER CURIAM. — In the court below, these were two cases, consolidated into one, and tried at the same time and before the same jury, the plaintiffs being husband and wife. There was evidence that the motorman opened the front door of the car, and invited Mrs. Sowash to leave the car from the front platform. She testifies that she followed his direction, and descended to the ground from the steps of the front platform. The ground was broken, and the night was dark, and the plaintiff testifies that, within a very few steps, she caught her foot in some way, and fell to the ground, and sustained her injuries. As there was no proof of any contributory negligence on her part, if the jury believed her story, she was entitled to recover, and her husband also. The case must necessarily have been submitted to the jury, and could not have been taken from them without error.

The judgments are affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY V. JOHNSON.

Supreme Court, Texas, December, 1898.

MASTER AND SERVANT — ENGINEER OF TRAIN INJURED IN COLLISION SLEEPING AT POST — EVIDENCE. — Where in an action for injuries sustained by an engineer in a collision the company showed that he disregarded signals which would have prevented the accident, and he showed that he was then engaged in other duties, the exclusion of evidence that the engineer had slept at his post while running his train on other occasions was proper.

1. For actions relating to injuries sustained while ALIGHTING FROM OR BOARDING TRAINS, STREET CARS, ETC., from the earliest period to 1896, in the several States and Federal courts, see vols. 2-7, AM. NEG. CAS., where the same are arranged in alphabetical

order of States and chronologically grouped. The *Pennsylvania* cases appear in 6 AM. NEG. CAS. For subsequent actions see vols. 1-4, AM. NEG. REP., and the current numbers of that series.

FROM a judgment of Court of Civil Appeals (39 S. W. Rep. 323) affirming a judgment for plaintiff, defendant brings error.

T. S. MILLER and HEAD, DILLARD & MUSE, for plaintiff in error.

WOLFE & HARE and C. B. RANDELL, for defendant in error.

GAINES, Ch. J. — The defendant in error brought this suit against the plaintiff in error and the Missouri, Kansas and Texas Railway Company of Texas to recover damages for personal injuries claimed to have resulted from the negligence of the servants of the defendants. There was a judgment in favor of the defendant in error against the plaintiff in error, but not against its co-defendant. The plaintiff in error appealed to the Court of Civil Appeals, where the judgment was affirmed.

The substance of the pleadings is thus stated in the opinion of the Court of Civil Appeals: "Omitting formal allegations, the amended petition stated that the point where the collision occurred was on a very steep grade, over which it was impossible to draw heavy freight trains, and that, for the purpose of transporting cars over said hill, the defendant had established a switch, called 'Warner,' between Red River and Denison, where cars were set out of south-bound freight trains, if the train was too heavy to be pulled over the hill, or, in the event such cars were not so set out of such character of trains, then defendant would have an engine, called a 'helper,' to assist in pulling over the hill. It was also alleged that if Warner switch was full of cars, and no helper was to be there, then that the conductors of south-bound trains would be notified of such fact, and the cars would be set out at Colbert, a station further north on the line of appellant. The allegations of negligence are quite voluminous, as set forth in the petition, but they are, substantially, that the freight train was too heavy to be pulled over Denison hill, that not a number of cars sufficient to lighten the train were set out at Warner, that there was no helper to assist the train over the hill, and that the employees of defendant in charge of the train were not notified to set out cars at Colbert. Then it was alleged that the employees in charge of the freight train negligently failed to flag the passenger train following it. On February 15, 1894, the defendant filed its first amended original answer, which consisted of a general denial, and special plea to the effect that due and proper signals were given; that the injury to plaintiff was caused by the negligence of his fellow-servants and by his own negligence. It is further alleged in said answer that plaintiff was furnished with a copy of rules and regulations for running trains, and that it was his duty to familiarize himself therewith; that he failed to do this, and failed to obey such rules, and that thereby his injuries resulted. Defendant

also, in such answer, sought to recover of plaintiff damages for the destruction of property caused by said collision."

In passing upon the application for the writ of error, we were of opinion that no error was pointed out by the petition, except by the seventh assignment. We are still of the same opinion as to all other specifications of error, and shall, therefore, confine our discussion of the case to the ground of error specifically mentioned.

The defendant in error (the plaintiff below) was the engineer of a passenger train of the railroad company, and the accident occurred by reason of a collision of that train with one of the regular freight trains of the company. The latter had reached a part of the road where there was a heavy up grade, and, being unable to surmount it at an ordinary rate of speed, was making very slow progress, if it had not come to a stop. While in this condition the passenger train overtook and ran into it. It was about four o'clock in the morning. There was evidence tending to show that there were signal lights upon the rear of the front train, and that a brakeman was sent back with a lantern to signal the passenger train, and also that the conductor dismounted with a lantern for the same purpose. There was also evidence tending to show that the passenger train ran by without paying any attention to the signals. On the other hand, the plaintiff himself testified that immediately before the accident an injector upon his engine was out of order, and that he was engaged in repairing it. The fireman on that train testified to the same fact, and also that at the same time he was employed in shoveling coal. During the progress of the trial, counsel for the defendants offered to prove by the fireman and others, in effect, that the plaintiff was in the habit of going to sleep while running his engine, and that while in that condition he sometimes ran past stations at which he ought to have stopped. The testimony, upon objection, was excluded, and the propriety of the court's action in that particular is the question presented by the assignment of error under consideration. We think the rule is well settled that when the question is whether or not a person has been negligent in doing, or in failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion. *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Tenney v. Tuttle*, 1 Allen, 185; *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215; *Guggenheim v. Railway Co.*, 66 Mich. 150, 33 N. W. Rep. 161; *Warner v. Railroad Co.*, 44 N. Y. 465; *Railway Co. v. Colvin* (Pa. Sup.) 12 Atl. Rep. 337; *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. Rep. 338; *Railroad Co. v. Kendrick*, 40 Miss. 374; *Chase v. Railroad Co.*, 77

Me. 62; *Hays v. Millar*, 77 Pa. St. 238; *Gahagan v. Railroad Co.*, 1 Allen, 187; *Railway Co. v. Robbins*, 43 Kan. 145, 23 Pac. Rep. 113; *Towle v. Improvement Co. (Cal.)* 33 Pac. Rep. 207; *Building Co. v. Klein (Colo. App.)* 38 Pac. Rep. 608. In *Tenney v. Tuttle*, above cited, the court say: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain." The principle has been frequently recognized, and sometimes applied, in this court. *Railway Co. v. Evansich*, 61 Tex. 3; *Railway Co. v. Scott*, 68 Tex. 694, 5 S. W. Rep. 501; *Railway Co. v. Rowland*, 82 Tex. 166, 18 S. W. Rep. 96; *Cunningham v. Railway Co.*, 88 Tex. 534, 31 S. W. Rep. 629. There may be some modifications of the rule, as applied to particular cases. One of these was acted upon in the case of *Cunningham v. Railway Co.*, above cited. There the question was as to the competency of one Rownie as an inspector of car wheels, and as to his negligence in failing to inspect a wheel; and there was testimony to show that there was an old crack in it, which, upon careful inspection, could have been discovered. Rownie had testified, in effect, that he knew that he had inspected it on the day in question, because it was his habit to inspect that car every day that it was in Llano. Evidence was offered to show that on several days shortly after the accident he had failed to make an inspection. It was held that the evidence should have been admitted. In the opinion the court say: "If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident; and this is particularly true, since his testimony disclosed that one of his reasons for knowing that he inspected the wheel was the fact that he invariably performed that duty before the car left Llano. Thus, it seems that frequent failures to perform this duty at different times would be competent evidence, tending to prove this mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident." The principle, as applicable to this class of cases generally, is that when the habit of care or of negligence, as the case may be, has no connection with the specific facts in evidence bearing upon the question of care, evidence of such care or habit is without sufficient probative force to effect the determination of the question. In the present case the evidence that the passenger train ran by without paying any regard to the signals did tend to

show that they were not seen. But at the same time it was consistent with the theory that the plaintiff was not asleep. The testimony on his own behalf, on the other hand, tended to show that the cause of the signals not being discovered was that both the engineer and the fireman were engaged in the performance of other duties, and were therefore not on the lookout. The evidence as to the cause of the accident and the conduct of the servants of the company in charge of the respective trains was direct, and, under the circumstances, proof that the engineer had slept while running his trains on other occasions was calculated to mislead the jury, and not to enlighten them. Under no rule, as we think, was it admissible.

It follows that in our opinion we were in error in granting the writ of error, and therefore the judgment of the Court of Civil Appeals and that of the District Court are affirmed.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY v. ZANTZINGER.

Supreme Court, Texas, December, 1898.

STATUTE — CERTIFICATION TO SUPREME COURT OF POINT OF LAW FOR DETERMINATION. — Under Rev. St. 1895, art. 1043, authorizing the Court of Civil Appeals to certify to the Supreme Court, an instruction for determination as to its correctness, the Supreme Court will only determine whether the charge is correct in the particulars indicated by the inquiry.

WILFUL INJURY TO TRESPASSER — BOY TO ESCAPE INJURY JUMPING FROM ENGINE. — Where it appeared that an engineer of a switch engine, to force a boy from the footboard of the engine where he was riding, contrary to the rules of the company, opened the cylinder cock and hot water was thrown upon him, and he jumped from the footboard and fell beneath the wheels, the act of the engineer was wilful assault, and the negligence of the boy in placing himself in such a position was not a contributory cause of the injury, and his act in jumping from the engine was not negligence (1).

THERE was a judgment for plaintiffs and defendant appealed, and the Court of Civil Appeals of the First supreme judicial district certified questions to the Supreme Court.

A. L. JACKSON, for appellant.

BALDWIN & MEEK, O. T. HOLT, and J. H. DAVENPORT, for appellees.

1. See 5 Am. Neg. Rep., p. 197, *ante*, **SERVANTS OF CARRIER FOR WHICH MASTER IS NOT LIABLE.**

GAINES, Ch. J. — The Court of Civil Appeals for the First supreme judicial district has certified for our decision the following questions:

“ The plaintiffs, Mrs. E. S. Zantzinger, who is joined in this action by her husband, is the mother of Almer Campbell, a minor; and the suit is in her own behalf, as well as in behalf of her son, to recover damages for personal injuries sustained by him, as it is claimed, through the negligence of the appellant, who was defendant below. The evidence adduced at the trial showed that defendant had a train of cars attached to the front end of a switch engine, which was running backwards, pulling the cars after it, into the city of Houston, from a neighboring station. The switch engine had no pilot or cowcatcher in front of it, but attached at each end was a footboard, extending across the track. The car nearest the engine was a flat car, several feet intervening between it and the footboard. While the train was slowly moving, Almer Campbell, without permission of any one, and contrary to the rules of the company, entered upon the footboard, for the purpose of riding into Houston, and stood upon it, between the engine and flat car. After he had ridden a short distance the cylinder cock of the engine was opened by the engineer, and hot water and steam were thereby thrown upon his legs and feet, whereupon he sprang from the footboard towards the flat car, intending to get upon the latter, but missed it and fell upon the track, and was run over and injured. There is evidence tending to show that the cylinder cock was opened by the engineer for the purpose of throwing the steam and water upon the boy, in order to make him get off the engine; but the evidence does not warrant the conclusion that the engineer intended more than this, or that he intended to injure Campbell in the way in which he was injured. The engineer had authority to eject persons wrongfully riding upon the engine. There is also evidence tending to show that the fright and pain caused to Campbell by the steam and water also caused him to lose his presence of mind, and to make the leap in order to escape. The steam and water caused pain and fright, but did not injure the skin. He testified that he was facing the engineer, with his back to the flat car, and that after the escape of steam and water commenced he turned and made the leap, calculating to reach the flat car with his feet, but not his hands; that after he fell between the cars he crawled forty or fifty feet in the direction in which the train was moving, in order to avoid the brake beam under the flat car, and then attempted to get across the rail, and was caught. There is also evidence tending to show that the engineer saw Campbell fall between the cars, knew his danger, and could have stopped the train in time to have avoided the injury. This we do

not regard as affecting the questions certified. The evidence is uncontradicted that in getting upon the footboard Campbell was a trespasser, and was guilty of negligence, and the court below so instructed the jury. He was nearly seventeen years of age, and understood the dangers and risks of the situation. The charge given below submitted only two grounds upon which the plaintiffs could recover, and carefully restricted the jury to them. The first is stated in the charge set out below, and the second submits the question whether or not the engineer, after discovering Campbell's danger, used proper care to prevent the injury. As to the latter we deem it unnecessary to state more. The charge referred to is as follows: 'You are instructed that if you find from the evidence that, at the time and place stated in plaintiff's petition, Almer Campbell got upon the footboard or runningboard attached to the engine then being operated on defendant's line of railway by its agents and servants, and that while the said Almer Campbell was standing upon said footboard, and while said engine and train of cars were in motion, the defendant's engineer in charge of said engine, by means of the cylinder cocks attached to said engine, caused hot water or steam to be thrown upon said Almer Campbell's person, for the purpose of frightening or scaring him off the engine and that the opening of the cylinder cocks for the purpose of letting out the hot water or steam was done for the purpose of throwing the water upon said Almer Campbell, and not in the operation of the engine; and you further find that to eject Almer Campbell from his position on the footboard of the engine was within the scope of the duty of said engineer in operating the engine, and that he had implied authority to do so, and that said act on his part, of throwing the water or steam on Almer Campbell, was negligence, as herein defined; and if you further find that hot water or steam so thrown on said Almer Campbell so frightened him, or caused him such pain, that in order to escape therefrom he made an attempt to jump upon the flat car in front of the engine, and fell upon the track, where the wheels of said car passed over his leg, injuring him substantially as set out in the petition; and you further believe that the said acts of the engineer in turning the hot water or steam upon the said Almer Campbell was negligence, as hereinafter defined, and was the proximate cause of the said accident, — you will find for the plaintiffs.'

"The questions certified are as follows: First. Should the act of the engineer in throwing out the steam and water for the purpose of ejecting Campbell from the engine be deemed wilful, in its relation to the result which actually followed, but was not intended, so

that the negligence of Campbell in placing himself in such a position, without which he would not have received his injury, cannot be considered contributory negligence, or should such act of the engineer be regarded as only a negligent cause of such injuries, with which the negligence of Campbell may be considered as contributing to the result? Second. Should the court, in applying to the facts of this case as above stated the rule announced in *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. Rep. 283, have assumed that Campbell's act in making the leap described was not contributory negligence, and that he was excused by the act of the engineer and the other facts of the situation from the exercise of ordinary prudence, or should it have submitted to the jury the question of the adequacy of such facts to produce a state of mind in which ordinary prudence should not be expected of him, and the further question whether or not such state of mind was produced? "

The statute which authorizes a court of civil appeals to refer an issue of law to this court for determination makes it the duty of the chief justice of that court "to certify the very question to be decided." Rev. St. 1895, art. 1043. By "the very question" we do not understand is meant an abstract question which may determine the issue as presented in that court, but the issue itself as there presented. For example, if it be the correctness of the ruling of the court in sustaining or overruling an exception to a pleading, the substance, at least, of the pleading and of the exception ought to be set out in the statement, and not merely an abstract question submitted, which may, in the opinion of that court, determine the point. Such, as we think, is the rule, also, as to the giving or refusal of instructions, the admission or exclusion of evidence, and, in general, to all the issues of law which may be presented upon the appeal. It is the precise question ruled upon in the trial court, as shown by the record in the Court of Civil Appeals, which that court is authorized to certify, and which we have jurisdiction to determine. In the certificate before us a portion of the charge of the court is set forth, and the questions certified seem to bear upon the correctness of the instruction quoted. It resolves itself, as it seems to us, into a question whether or not the charge be correct in the particulars indicated by the inquiry. We infer from the statement accompanying the questions that the action of the minor son to recover damages for his injuries, and that of his mother to recover for the loss resulting to her from the same cause, were prosecuted together in one proceeding without objection. We have had some doubt whether we ought to answer the second question, and we are now of opinion that, if we had the case of the son only, that question

would be abstract, and should not be determined. So far as he is concerned, upon the hypothesis stated in the instruction he was entitled to recover, at least for the assault made upon him, without reference to the injuries which subsequently resulted; and, therefore, as to him the charge was correct. The jury were not told that he had a right to recover for the injury to his leg. If such instruction was elsewhere given, the Court of Civil Appeals has not so stated. Therefore it seems to us that the question of his right to recover for the loss of his leg, in the event that his action succeeding the assault upon him was negligent, does not arise out of the very question before the Court of Civil Appeals. But the case of the mother is different. It is apparent from the statement of the case that no injury resulted to her simply from the throwing of the hot water upon her son. If it had stopped there, no loss would have resulted to her. Her right of action, if it exists at all, results from the injury to his leg, and the consequent expenses and loss of service. Therefore, unless, upon the facts hypothetically stated in the instruction of the court, she was entitled to recover the damages resulting to her from that injury, the charge is not correct as a whole. The charge makes no distinction as to the respective rights of the mother and the son, but instructs the jury that, if they find the facts as stated, to find "for the plaintiffs." We conclude that, in this aspect of the case, the question of the correctness of the charge presents both points upon which it seems the Court of Civil Appeals desired to elicit our opinion, and we therefore proceed to answer the question:

1. If the servants of the appellant company purposely threw the hot water upon Campbell, it was an intentional, and not a negligent, wrong. The fact that he was a trespasser upon the train did not justify the engineer's conduct. The latter had the right to remove him, and for that purpose to put his hands upon him, and to use such force as was necessary to accomplish that end. But the means adopted resulted in an assault. We answer the first question, in its first form, in the affirmative; and in its second form, in the negative.

2. The second question presents a novel and difficult point, and one upon which we have found no direct authority. It must be resolved upon principle. When the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover. It is not so if the act of the defendant be wilful. In speaking of the rule of contributory negligence, the Supreme Court of Indiana say: "The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus

assaulted is under no obligation to exercise any care to avoid the same, by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery." *Steinmetz v. Kelly*, 72 Ind. 442. See, also, *Ruter v. Foy*, 46 Iowa, 132; *Brownell v. Flagler*, 5 Hill, 282. The principles announced apply to the question of the original right of action. The question under consideration, however, involves rather an inquiry as to the duty of a party who has been injured by the fault of another to use reasonable precautions to avoid the consequences of his injury. 1 Sedg. Dam. sec. 202. In negligence cases such duty is usually regarded as a part of the law of contributory negligence. The rule is that if a plaintiff, who has been injured by the negligent conduct of the defendant, fails to exercise reasonable care to avoid the consequences of his injury, he cannot recover for so much of his damage as results from that failure. But does this rule apply to the case of a wilful injury? We are of opinion that it does not. Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was wilful, by a parity of reasoning the defendant in such a case should not be permitted to say that, but for the negligence of the plaintiff in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery. We apprehend that a plaintiff cannot make a case by intentionally contributing to the injury which the defendant wilfully intends to inflict upon him. For example, should one intentionally hurl a missile at another, with the intent to injure, and should the other voluntarily place himself in its way, and thereby receive a battery which he would otherwise have escaped, the person so struck could not recover. So, when he has been intentionally injured, he should not be permitted to recover damages which might have resulted from his wilful omission to take reasonable precautions to avoid the consequences of the wrong. Since a negligent act of the plaintiff, contributing to a result brought about by the concurring negligent act of the defendant, exonerates the defendant from the consequences of his wrong, — *pro tanto*, at least, — so a wilful act of the plaintiff should have a like effect in case of an intentional injury. *Loker v. Damon*, 17 Pick. 284. In the case cited, Chief

Justice Shaw says: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not the remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain, without repairing, a great length of time after notice of the fact, and his furniture or pictures, or other valuable articles sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed that, as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say that, in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages for that part of the injury which consisted in removing the fence and leaving the close exposed." Where, in cases of an intentional tort, the plaintiff has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a wilful omission on his part, he ought not to recover for the damages which might have been prevented by proper care; but, on the other hand, we think that he should recover his full damages where he has been guilty of ordinary negligence only. A party cannot voluntarily inflict an injury upon another, and then claim that the party injured owes him the duty to exercise ordinary care to protect him from the consequences of his act. We answer the second question by saying that, in our opinion, the trial court did not err in failing to submit the question of Campbell's contributory negligence in the charge set out in the statement.

GRAHAM V. MCNEILL.

Supreme Court, Washington, January, 1899.

CARRIER AND PASSENGER — STANDING ON PLATFORM OF CAR OF CROWDED TRAIN. — A notice to passengers not to stand upon the platforms of the cars is waived by a carrier that fails to provide suitable accommodations inside.

SAME — INSUFFICIENT CARS. — A carrier is negligent in its duty to its passengers who are compelled because of an insufficient number of cars to stand upon the platforms.

CONTRIBUTORY NEGLIGENCE. — For a passenger to stand upon the platform of a car of a crowded train is not negligence *per se*, and where he is thrown from the car by its sudden lurch, the questions of negligence are for the jury.

APPEAL from judgment of Superior Court, Whitman County, in favor of plaintiff, in action against McNeill, as receiver of Oregon Railroad and Navigation Co.

COTTON, TEAL & MINOR, for appellant.

M. O. REED, for respondent.

REAVIS, J. — Action to recover damages for personal injuries sustained by plaintiff while a passenger on a railway train operated by defendant. The complaint alleges that on the 7th of October, 1895, at the town of Oakesdale, plaintiff purchased from an agent of defendant an excursion ticket which entitled plaintiff to be transported as a passenger from Oakesdale, in the State of Washington, to the city of Spokane and return, on or before the 9th day of October, 1895; that plaintiff was transported according to the terms of the ticket to Spokane, and on the 9th of October, 1895, while returning home, at the instance and request of defendant, and pursuant to the terms of the ticket, plaintiff entered one of the coaches of defendant's train carrying passengers from Spokane to Oakesdale, and by reason of the very crowded condition of the cars was unable to obtain a seat or room in any one of defendant's coaches, and was compelled to ride, and did ride, upon the platform of one of the cars of the train, and while so riding the conductor permitted, compelled, and allowed the plaintiff to occupy such position upon the platform without objection or protest, well knowing at the time the overcrowded condition of each and every one of the coaches in said train, and while the plaintiff was standing as aforesaid on the platform, by reason of the negligent, irregular, improper, overcrowded, overloaded, and careless manner in which the said train was being

run by the defendant, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden careless and unnecessary lurch of the train, caused by the carelessness of the defendant, his servants and employees, in the management and operation of said train, thrown from the platform to the ground in a violent manner, and sustained serious injuries. The answer denies all of the allegations of negligence and damage contained in the complaint, and sets up an affirmative defense, and, in substance, states contributory negligence, by allegations that the plaintiff was drinking when he left Spokane, and continued to drink, and was so far under the influence of liquor as to be intoxicated, and that such intoxication was not known to the defendant; that, after the train left, the plaintiff was standing upon the platform, in a position where, if he had exercised care in preserving his balance, he would not have been injured; that while so standing on the platform the plaintiff's hat was blown off by the wind, and the plaintiff negligently and carelessly released his hold upon the railing of the car, and with his right hand undertook to catch his hat, and in so doing lost his balance, fell from the platform to the ground, and was thereby injured, and that the plaintiff was not thrown from the platform by a careless or unnecessary or any, lurch of the train; that while so standing and exercising care the plaintiff was in a safe position, where he could not have received the injuries complained of. The answer also affirmatively contains the following allegation: That the fact that the plaintiff was occupying the platform was not known to any of the defendant's agents or servants, and that the position occupied by the plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence. The plaintiff's reply merely denies each and every allegation of new matter contained in the separate defense of the answer. Evidence was submitted by both parties upon the issue of contributory negligence tendered by the defendant, — upon the part of plaintiff, that he exercised due care while standing on the platform; and by defendant, some evidence tending to show that plaintiff attempted to catch his falling hat, and thereby fell. No evidence was directly introduced as to whether the platform, under the circumstances, was in itself a dangerous place, or otherwise. The evidence showed that an excursion train was advertised and passengers invited to procure tickets therefor from Oakesdale to Spokane, to visit the fruit fair in the latter city; and the advertisement also requested the passengers to notify the agent, so that necessary equipments could be ordered. A large number of passengers were carried to Spokane between

Monday, the 7th, and the 9th of October. On the 9th the railroad company carried a crowd of people home on twelve coaches, drawn by one engine. The evidence tends to show that all the seats were occupied, and that the aisles were very much crowded, in the respective coaches, and that people were riding on all the platforms of the train. The plaintiff got on the train at Spokane on the 9th, and passed through six crowded coaches, looking for a seat. The aisles were crowded with people standing along between the seats and leaning over upon them. The plaintiff then took a position on the platform at the rear end of the coach, where he stood. There were six other passengers standing between the two coaches, one or two of them being ladies; and there were ladies generally, as well as men, carried on a number of the platforms of the coaches. The conductor took up the ticket of plaintiff while he was standing upon the platform, and said nothing about the position which plaintiff or anyone else occupied on the platform. While the train was going at considerable speed, and on rather an incline, use of the air brake caused the coach on the platform of which plaintiff was standing to jolt or lurch, and plaintiff was thrown from the train and injured. After the introduction of testimony on the part of the plaintiff had been concluded, defendant moved for a nonsuit, which was overruled; and thereafter, at the conclusion of the case, defendant asked for an instruction for a verdict for itself, which was refused. A verdict was returned for plaintiff, and judgment entered thereon.

A number of objections were taken to the instructions of the court by the counsel for the defendant, and also objections to refusal by the court to give instructions tendered by counsel for defendant. Instructions which are deemed material here were given as follows: "Now, gentlemen of the jury, if you find from the evidence in this case that the plaintiff was a passenger upon this train at the time alleged, and that he fell or was thrown from the train or from the platform — as alleged in both the complaint and answer, I believe — of one of the coaches, it is for you to determine from the evidence in this case, first, as to whether or not the plaintiff was on that platform from his own choice, or whether or not the cars of the defendant upon that occasion were crowded in such a condition that it necessitated him to take up a position upon the platform in question in order to ride from Spokane to Tekoa." "Now, you are further instructed by the court that if you find from the evidence in this case that there was no room inside of the cars for the plaintiff to either sit or stand, or that there was any other reason justifying the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary

for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent being thrown from the train, by the motion thereof, from where he was; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train, by the motion thereof, which could reasonably be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant." "The jury are further instructed that it is the duty and obligation of a common carrier of passengers for hire to furnish passengers with seats for their accommodation; and, if you find from the testimony in this case that the defendant in this case received the plaintiff as a passenger, the plaintiff thereby became entitled to a seat in one of the cars of the defendant's train, and it is not the duty of the plaintiff to go from car to car while the train is in motion to find a seat; and if the defendant received the plaintiff as a passenger, and failed to furnish plaintiff with a seat, then the court instructs you that it was not negligence for the plaintiff to take a position upon the platform of one of the defendant's cars, provided that said position was one where a person exercising ordinary care and prudence would be safe from injury if the train of the defendant were run in a careful manner. The jury are further instructed that if you find from the evidence in this case that the defendant failed to furnish accommodations for the passengers on the train mentioned, so that a large number of passengers upon that train were compelled to stand in the aisles and upon the platforms of those cars, then you must find that the defendant was guilty of negligence; and, if you find that the defendant was guilty of negligence, you cannot find that the defendant is liable to the plaintiff in this action, unless you find the plaintiff himself was free from negligence upon his part." "The jury are instructed that, if there were no vacant seats in the car of defendant, the plaintiff is not chargeable with negligence in standing on the platform of the car of the defendant, providing that you find that was the most comfortable and convenient place for the plaintiff to occupy on the trip; and the defendant is not absolved from liability for injury to a passenger while riding on the platform of a car, unless the defendant provided room inside of the car for the proper accommodation of the passengers, and that a mere space on the inside, in which to stand between the seats, is not ordinarily such proper accommodation. If the jury find from the evidence in this case that there were in fact no vacant seats in the car of the defendant, it is for you to determine whether it was negligence on the part of the plaintiff to stand on the platform, even if there was room to stand in the inner

gangway. And you are further instructed that in no case can you find for the plaintiff, unless you find that the defendant was guilty of some negligence, by himself or some of his agents or servants." "If the defendant was guilty of negligence in furnishing seats for the passengers, including the plaintiff, but the plaintiff, through his own carelessness and negligence, caused the injury, then you should find for the defendant." The court, at the request of defendant, gave the following instruction: "If you find from the evidence that there was no room inside the car for the plaintiff to either sit or stand, or that there was any other reason [to] justify the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent from being thrown from the train, by the motion thereof, while running; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train, by the motion thereof, reasonably to be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant."

The testimony discloses that notices were posted on the coaches of defendant's train that passengers must not stand on the platform, and that passengers were not allowed to go upon the platform of the car while the train was in motion. It will be observed that the complaint charged that, while the plaintiff was standing on the platform, by reason of the careless manner in which the train was being run, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden, careless, and unnecessary lurch of the train, caused by carelessness of the defendant in the operation of the train, thrown from the platform to the ground in a violent manner. And the answer, after denying the negligent acts charged in the complaint, alleges that the position occupied by plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence, and that plaintiff was standing upon the platform in a position where, if he had exercised care in preserving his balance, he would not have been injured. An inspection of the record at the trial indicates that the theory upon which the defense was conducted was that the plaintiff contributed to the falling from the train by his own carelessness in balancing and standing upon the platform. The question of the occupation of the platform by plaintiff in itself being dangerous was not particularly brought to the attention of the court or jury until instructions were requested. It was insisted by the defendant, however, during the

trial, that it was not negligence contributory to the accident, on the part of the defendant, to fail to have the necessary cars and provide the necessary accommodations for its passengers returning from Spokane on the 9th of October. Counsel for defendant now urge that it is *prima facie* negligence or negligence *per se*, as a matter of law, for a passenger to stand upon the platform of a railway train in motion, and that, where such position is plainly the cause of the passenger's injury, he is guilty of negligence, as a matter of law, and that, where such position is not plainly the cause of the injury, the question of contributory negligence should be left to the jury as a fact. And the familiar rule is stated that every man in the possession of his faculties is responsible for the consequences reasonably to be anticipated from his own acts, and it is contended that reasonably prudent men do not, under ordinary circumstances, stand upon the platforms of trains in motion, and, when the passenger is thrown from the platform by some sudden lurch or jerk, then his standing upon the platform is plainly the cause of his injury; and many cases are cited by counsel, some of which sustain their contention, but some of which are upon facts essentially different from those in the case at bar. For illustration, in the case of *Railway Co. v. Moneyhun* (Ind. Sup.), 44 N. E. Rep. 1106, the plaintiff went out, not upon the platform, but upon the lower steps of the platform, and leaned over, and by a lurch of the train was thrown therefrom. A number of cases are also cited upon the presumption of negligence from the happening of the accident, and the presumptions arising therefrom, and also other cases where proper accommodations were provided for the passenger inside the coach, and he left and went out, and stood on the platform. But none of the cases examined are exactly in point with the facts under consideration here. In *Hutch. Carr.* (2d ed.), sec. 652, it is stated: "Whether standing upon the platform of a railway car voluntarily, and without any necessity for so doing, would be evidence of the want of such due and reasonable care on the part of the passenger as would exonerate the company from liability in case of an accident resulting in his injury, would, of course, depend upon all the circumstances, and would be the proper subject of inquiry by a jury." See *Willis v. Railroad Co.*, 34 N. Y. 670; *Werle v. Railroad Co.*, 98 N. Y. 650; *Graham v. Railway Co.*, 149 N. Y. 336, 43 N. E. Rep. 917; *Merwin v. Railway Co.*, 113 N. Y. 659, 21 N. E. Rep. 415 (1). *Beach, Contrib. Neg.* (2d ed.), sec. 149, says: "It is not negligence *per se* for a passenger to

1. *Merwin v. Manhattan R'y Co.*, 113 N. Y. 659, affirming 48 Hun, 608, is reported in 5 Am. Neg. Cas. 441.

ride upon the platform of a railway car; not is it negligence to stand upon the platform of cars in motion, when there are no vacant seats inside the car." In *Willis v. Railroad Co.*, 34 N. Y. 670, it was said: "There is no rule of the common law which makes it the duty of the passenger to the carrier to select a position in the vehicle least exposed to danger through the wrongful act of the proprietor. A seat on the outside of a stagecoach may be more hazardous than an inside seat, if the driver negligently overturns it on a pavement or a hillside; but the selection of that position is neither negligence *per se*, nor tributary, in a legal sense, to the injury." Mr. Justice Miller, in *Marquette v. Railroad Co.*, 33 Iowa, 564 (1), said: "It is not, at common law, necessarily negligence in a passenger to ride on the platform of a car. *Meesel v. Railroad Co.*, 8 Allen, 234. It certainly is not improper for him to do so, if he cannot get a seat inside. *Shear. & R. Neg.*, sec. 284. Nor is it negligence in passengers, unable to find seats in a car, to pass into another, by direction of the conductor, while the train is in motion. *McIntyre v. Railroad Co.*, 43 Barb. 532 (2). For while moving from one car to another, without cause, while a train is in motion, may be negligence, yet, if a passenger does so in obedience to a direction or request of the officer in charge of the train, the act may be deemed consistent with proper care, since passengers have a right to rely on the judgment of the officers of the train in respect to such matters, and are bound to obey the reasonable directions of such officers. *Shear. & R. Neg.*, sec. 285. In judging of what is negligence in a particular case, regard is to be had to the growth of science and the improvement of the arts which take place from time to time; for many acts or omissions which are now evidence of gross negligence were but a few years ago consistent with great care and skill, and, on the other hand, many things which a few years since would have been considered negligence are now consistent with proper care and skill. *Shear. & R. Neg.*, sec. 7. And especially is this true in respect to railroad carriages, which within a few years have been transformed from crude and clumsy cars into magnificent traveling palaces, supplied in many cases with the comforts, conveniences, and even luxuries of elegant dwellings, in which the public may travel at a speed and with a degree of safety which thirty years ago would have been in the highest degree perilous to life and limb. And within a very short period there have been such wonderful

1. See abstract of this case in 8 Am. Neg. Cas. 252 etc., *R. R. Co.*, 37 N. Y. 287, affirming 47 Barb. 515, reported in 5 Am. Neg. Cas. 97.

2. See *McIntyre v. N. Y. Central,*

improvements in the platforms and couplings of railway passenger coaches as that passengers may, with comparative safety, pass from the other cars of a train to the sleeping and dining coaches, on some of the fastest trains of this country, while in motion. Daily, ladies, — with and without gentlemen, — by hundreds, pass from car to car, and especially to sleeping and dining coaches, while the train is moving at a rate of speed much above twenty miles an hour, and yet accidents from this practice seldom occur. It cannot be true, therefore, as a matter of fact, that to pass from one car to another while the train is in motion at the usual rate of speed is so necessarily dangerous that it may not be justified under any circumstances; nor can it be true, as a fact, that the removal of a passenger from one car to another while the train is moving at its regular speed is so necessarily dangerous as that it cannot lawfully be done by the officer in charge of the train, under any circumstances, or for any cause. But, if the fact were otherwise, it should be left to the jury to find upon the evidence, and it is not the province of the court to pronounce it so as matter of law." 2 Wood, R'y Law, sec. 308, declares the rule: "A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that the passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there." See, also, section 308, as to the duty of the railroad company to furnish each passenger with a seat. It cannot be successfully maintained now that the platform of a railway train is necessarily such a position of danger that no ordinarily prudent person would go upon it while the train was in motion. Such contention would be false to common experience in railway travel. Prudent and careful persons do frequently go across platforms of moving trains, and do stand upon them; and the conductors of trains do collect fare from passengers upon platforms, and frequently on ordinary roadways, and in first-class passenger coaches do not take any notice of such position of travelers. As observed by some of the courts, the modern improvements for safety in coaches, platforms, train appliances, and roadways have largely modified the risk of standing on the platform. But the defendant in this instance had a notice to the passengers to keep off the platform. Companies may make reasonable rules, and the passenger must obey them. Such a rule could doubtless be enforced, but such rules may also be waived by the acts of the company. Hutch. Carr., *supra*, very fairly states the rule. But the defendant in this case waived its notice against standing on the platform when it failed to provide suitable accommodations for the plaintiff inside its coaches,

and yet received him on its train. In the case of *McQuillan v. City of Seattle*, 10 Wash. 465, 38 Pac. Rep. 1120, it was said, "Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury."

The evidence discloses clearly that defendant was negligent in its duty to the passenger when the train left Spokane in its overcrowded condition. Not only did it not furnish seats for the passengers, but the passageways inside the coaches were crowded by standing passengers, and the platforms had men and women standing thereon who could not be accommodated inside the coaches; and, as has been observed by some of the authorities, it is the duty of the conductor to seat passengers. The instructions given by the Superior Court are not phrased in happy terms, perhaps; but, taken altogether, the question of contributory negligence, and also of the principal negligence, was fairly submitted to the jury, and the case cannot be reversed because the language used in the instructions was not aptly chosen, and may be open to criticism.

The judgment is affirmed.

ANDERS, DUNBAR, and GORDON, JJ., concurred.

BARTLETT V. TOWN OF CLARKSBURG.

Supreme Court of Appeals, West Virginia, December, 1898.

MUNICIPAL CORPORATIONS — LIABILITY FOR INJURY FROM DISCHARGE OF FIREWORKS. — 1. An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation.

2. As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein.

(Syllabus by the Court.)

FROM a judgment of Circuit Court, Harrison County, sustaining a demurrer, plaintiff brings error.

W. SCOTT, for plaintiff in error.

JOHN BASSEL and M. M. THOMPSON, for defendant in error.

MCWHORTER, J. — R. B. Bartlett brought his action on the case in the Circuit Court of Harrison county, to recover damages against

the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the council and police and other officers of said town, and that the said discharge of firearms, fireworks, etc., was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites *Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. Rep. 727, which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under consideration, it is not alleged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In *Speir v. City of Brooklyn* the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons; nor could the mayor bind the city by a permit for the granting of which he has no color of authority from the common council, and which was not within the general scope of his authority." The case of *Speir v. City of Brooklyn* is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with Judge Okey as to the nuisance in the case of *Robinson v. Greenville*, 42 Ohio St. 630, where he says: "That firing of cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance, and that all persons engaged in such unlawful act are personally liable for all damages caused thereby, are propositions concerning which there is no room

for difference of opinion. But a very different question is presented when it is attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar the acts complained of are equally as great a nuisance as the firing of cannon, as stated in above case. Appellee contends that "the law in this State has been settled in at least two cases upon all fours with this case," viz., *Mendel v. City of Wheeling*, 28 W. Va. 233, and *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. Rep. 707. Cooley on Torts (pages 738, 739) says: "Municipal corporations are to be considered — First, as parts of the governmental machinery of the State, legislating for their corporations, and planning and providing for the customary local conveniences of their people; second, as corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves or as the State has imposed upon them; and, third, as artificial persons owning and managing property. In the last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. * * * For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever, except the political responsibility to their corporations and to the State. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because coasting in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks in the city is temporarily suspended, or because provision is not made for lighting the streets. * * * Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectively their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority." In *Robinson v. Greenville*, *supra* (Syl. point 4): "An assemblage

of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges. *Held*, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Rev. St. Ohio, sec. 2640); and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same." Also *Borough of Norristown v. Fitzpatrick*, 94 Pa. St. 121 (Syl. points 1 and 2): "1. N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict, found that the cannon had been fired at short intervals for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by, and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, etc. *Held*, that the borough was not liable. 2. Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefor must be had to the police; but for the doings or misdoings of those who compose this force the municipality is not liable." *Campbell's Adm'x v. City Council*, 53 Ala. 527: "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the city, the police are *quasi* civil officers, for whose misfeasance or nonfeasance in office the city is not responsible, though they are personally answerable." *City of La Fayette v. Timberlake*, 88 Ind. 330: "A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting. A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the State laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers. They are not its agents, but public officers." *Faulkner v. City of Aurora*, 85 Ind. 130: "A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly,

in the presence of its officers and police, to the obvious danger of persons using the streets." *Ball v. Town of Woodbine*, 61 Iowa, 83, 15 N. W. Rep. 846. "Where fireworks are discharged within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the proceedings." *Hill v. City of Charlotte*, 72 N. C. 55: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. *Held*, that the corporation was not liable for such destruction." *Dill. Mun. Corp.*, sec. 753: "A municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character." *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; *Forsyth v. Mayor, etc.*, 45 Ga. 152; *Fisher v. City of Boston*, 104 Mass. 87.

Authorities might be multiplied indefinitely. While the decisions are not all on one side, yet the great weight of the authorities, including those of our own State, is with the action of the Circuit Court in this case. In *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. Rep. 707 (Syl. point 1), it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein." *Mendel v. City of Wheeling*, 28 W. Va. 233.

The judgment will have to be affirmed.

SCHWARTZ v. SHULL.

Supreme Court of Appeals, West Virginia, December, 1898.

- MASTER AND SERVANT — PROXIMATE CAUSE — EXPLOSION OF DYNAMITE. — 1. The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. Rep. 869.
2. The proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted.

3. Where the evidence is not contradictory, proximate cause is a question of law to be determined by the court, and not a question of fact to be submitted to a jury.
4. A person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given.
5. An instruction to the effect that if the jury believe that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous.

(Syllabus by the Court.)

ERROR to Circuit Court, Mineral County.

C. WOOD DAILEY, for plaintiff in error.

F. M. REYNOLDS, for defendant in error.

DENT, J. — An action of trespass on the case, instituted by A. F. Schwartz against L. E. Shull and others, resulted in a verdict for the plaintiff for the sum of \$1,200. Defendant Shull appeals, and relies on the following assignment of errors: "First. Overruling petitioner's demurrer to the plaintiff's amended declaration. Second. Refusing to give petitioner's instruction A, as set out in bill of exception No. 1. Third. Giving the three instructions, and each of them, at the instance of the plaintiff, as set out in bill of exception No. 2. Fourth. Refusing to give, at the instance of petitioner, instructions Nos. 3, 4, 7, 8, 11, 13a, 14, 17, and 18, as asked, and as set out in petitioner's bill of exception No. 3, and in modifying Nos. 7 and 14, as set out in said bill of exception. Fifth. Overruling petitioner's motion in arrest of judgment and for a new trial, as set out in defendant's bill of exception No. 4. Sixth. Overruling petitioner's objection to that part of the testimony of Mary Schwartz, wife of the plaintiff, set out in petitioner's bill of exception No. 5, and in refusing to exclude such evidence from the jury."

As cause for demurrer, defendant says that it is not negligence to carry dynamite and caps in sawdust, in an exposed condition, on a locomotive engine, unprotected from sparks thrown off by such engine. The result of the accident is a sufficient answer to this. It was a dangerous explosive, carried in a dangerous place, in close proximity to defendant's employees on such engine, by his direction. A person of ordinary prudence, fully advised of the dangerous character of dynamite, would not undertake such risks. In the case of *Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. Rep. 869,

the law is stated correctly to be: "The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances," — such care being regulated to a great extent by the dangerous character of the article; a stick of dynamite, requiring more care than a potato, although both might be dangerously handled.

Petitioner's first instruction, which is in these words: "The court instructs the jury that the evidence in this case is not sufficient to sustain the issue on the part of the plaintiff, and they should find a verdict for the defendant," — is virtually nothing more than a demurrer to the declaration. From the plaintiff's standpoint, the declaration has been fully proven; and the allegation that the evidence is insufficient, although it fully tends to sustain every averment of the declaration, being, in effect, a demurrer to the evidence, is equivalent to saying that the plaintiff has no cause of action. The court, therefore, could not do otherwise than to hold such instruction bad. The plaintiff's evidence establishes the facts to be as follows: That the defendant Shull placed some explosive caps in an open box containing eight sticks of dynamite placed in sawdust, and directed an employee by the name of Davis to take the same to the tram road, and put it on the engine; that Davis, in obedience to such direction, set such open box on the tender; that after the engine, to which several trucks were attached, had proceeded some distance, the engineer noticed the sawdust was on fire, and called to the plaintiff, who was riding on the tender as an employee of the defendant, to throw the box off. He promptly did so, and while he was in the act of doing it the dynamite exploded, and seriously injured him. This evidence is certainly sufficient to go to the jury on the question of negligence, and it would be for it, and not the court, to say whether the defendant, in directing the explosives to be placed on the engine in their exposed and dangerous condition, was exercising the ordinary care of a prudent man towards his employees. As to whether defendant Shull directed Davis to put the dynamite on the engine is a disputed question, the plaintiff's evidence tending to prove that he did, while the defendant's evidence tends to the contrary; thus raising a question for the jury to determine.

Taking up the numerous instructions refused to the defendant, we find the court refused to give instruction No. 3, which is as follows: "The court instructs the jury that, even if they believe from the evidence that defendant Shull put the caps spoken of in the evidence into a box with dynamite, and told the witness John Davis to carry

it over to the train, and put it on the engine, and said Davis put the same on the tender, and though the jury may believe that such action on the part of said Davis was negligent, and that such negligence was the proximate cause of the plaintiff's injuries, yet that does not constitute negligence on the part of said Shull." This instruction tries to make a distinction between the tender and the engine, which is untenable, as the tender is a necessary part of the engine, and is that part on which it was shown the employees were in the habit of carrying articles for the company's use. Such a distinction is a mere quibble, especially in the face of the fact that the defendant denies telling Davis to put the box on the engine.

Instruction No. 4, refused, is as follows: "The court instructs the jury that if they believe from the evidence that defendant Shull told witness John Davis to take the box with dynamite and caps in it over to the tram road, and that said Davis took the same over, and put it on the tender, and that to do so was negligence, and that such negligence caused the plaintiff's injury, yet such negligence was the negligence of said Davis, a fellow-servant of the plaintiff, and that for such negligence the defendant is not responsible." This instruction was also properly refused, as the jury had the right to infer from the evidence in the case that Davis, in placing the box on the tender, was acting in obedience to the instruction of the defendant, and not in disobedience thereto.

Instructions 7, 11, 17, and 18 are as follows: 7. "The court instructs the jury that if they believe from the evidence that the plaintiff, by his own negligence, or want of care and prudence, contributed directly to the injuries which he received, then they should find a verdict for defendant Shull, although they may believe that he also was negligent in the matter." 11. "The court instructs the jury that if they believe from the evidence that the plaintiff's injuries resulted from the explosion of the dynamite when the plaintiff threw it from the tender, or when it struck the ground or rocks, and that the said plaintiff knew, or ought to have known, that it was dangerous to handle said dynamite in that condition, and the jury further believe from all the evidence in the case that it was dangerous, and that it was imprudent and careless in him to do so, then they should not find a verdict in favor of the plaintiff." 17. "The court instructs the jury that, though they may believe from the evidence, even under the instructions of the court, that the defendant Shull was guilty of negligence, yet if they further believe from the evidence that the plaintiff was guilty of carelessness or imprudence that contributed directly to his injuries, they should find for the defendant." 18. "The court instructs the jury that if they believe

from the evidence that it would have been less dangerous to throw the dynamite off on the upper side of the road than on the lower side, and that the plaintiff knew that fact, or should have known it, and yet threw the box off on the upper side, when he could have thrown it off on the lower side, then the plaintiff is not entitled to recover." These instructions raise questions of contributory negligence. This does not appear in the case, for the undisputed evidence plainly frees plaintiff from all contributory negligence. It shows he was endeavoring to save the defendant's property and the lives of himself and others from destruction, and he did, under the circumstances, only what a brave man could do, while a coward might have fled, and left the property of his employers, and his fellow-servants, to their uncertain fate. Under the circumstances it was the duty of the court to settle the question of contributory negligence in favor of the plaintiff, as the evidence justifies no other course. Instruction No. 7, modified, which is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, in taking up the box of dynamite and throwing it from the tender, showed a want of reasonable care and prudence, and that such want of care and prudence was the proximate cause of the injuries he received, then the jury should find for the defendant," — was more than the law entitled the defendant to have on the question of contributory negligence. Instruction No. 8 is liable to the same objections as instructions Nos. 3 and 4. It is as follows: "The court instructs the jury that if they believe from the evidence that the defendant Shull, after he put the caps into the box with the dynamite, told the witness Davis to take the box down to the tram road, and put it on the engine, or told him to take it over to the tram road without telling him what to do with it after getting it there, and believe that plaintiff, Schwartz, and others working on construction of tram road, were going up on the train, together with Charles Bender, acting as engineer, and Davis as fireman, in charge of the logging train, then said Shull is not liable in this case because he failed, after he got to the tram road, and before or after starting, to ascertain where said dynamite or caps had been placed for carriage; and is not liable in this action because they were placed together, by said Davis, on the back of the tender, even if the jury believe that it was negligence in said Davis to put them there, and that the plaintiff's injuries resulted directly from such negligence."

Defendant's instruction 13a is as follows: "The court instructs the jury that, even if they believe from the evidence that defendant Shull, after the explosion and injury of the plaintiff, stated or admitted that he was to blame in the matter, or that it was his fault,

yet that does not entitle the plaintiff to recover unless the evidence in the case before the jury, including such statement of said Shull, if the jury believe it was made, under the instruction given by the court, shows that the said Shull was negligent, and that his negligence was the direct and proximate cause of plaintiff's injuries." This instruction should have been given, for a person may acknowledge that he is morally responsible for an act when not legally so. He may feel, on account of sensitiveness, that by using more prudence than the law requires, or by having prevented a remote cause, he might have rendered the proximate cause of the accident impossible.

Instruction No. 14, refused by the court, and No. 14, as modified by the court, applied alone to the allowance of doctor's bills; No. 14 being that no such bills should be allowed, and the modified instruction allowing such as had been established by proof. The declaration alleges, among other things, that the plaintiff "incurred great and heavy expense in his endeavor to be cured of the said injuries, which expense amounted to the sum of — dollars." The court therefore did not err in this instruction, as plaintiff had the right to recover his curative expenses, together with his other damages, if the same did not exceed the amount claimed, to wit, \$5,000. Nor is instruction 14, as modified, inconsistent with instruction No. 1 given for plaintiff. No. 1 tells the jury to allow him his medical expenses, while No. 14, as modified, limits the same to the amount proved to have been expended.

Plaintiff's instructions Nos. 1 and 3, which are as follows, to wit: 1. "The court instructs the jury that, if they find the issue for the plaintiff, Schwartz, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he received the injury complained of, in consequence thereof, the character and extent of such injury, and its continuance, if permanent, together with his loss of time and service, and his disability, if any, resulting from said injury, to earn a livelihood for himself and family, and his necessary expenses for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury, not to exceed the sum of five thousand dollars." 3. "The court instructs the jury that if they believe from the evidence that the plaintiff, Schwartz, was injured by the explosion of dynamite, as complained of in the declaration, and that the negligence of the defendant Shull was the proximate cause of the injury received by the plaintiff, then they must find a verdict for the plaintiff," — properly propound the law, and were rightly given.

Plaintiff's instruction No. 2 is as follows, to wit: "The court instructs the jury that if they believe from the evidence that the defendant Shull was guilty of negligence in putting the dynamite mentioned in the evidence in a box, and in with it caps for exploding such dynamite, and putting sawdust on it, without the box so packed being covered or protected, then they must find for the plaintiff, if they believe such negligence of the defendant to have been the proximate cause of the injury complained of, although they may further believe from the evidence that the witness Davis was negligent in placing said box so unprotected on the tender of the engine." This instruction should not have been given, for it is misleading, in that it submits to the jury the question of determining whether the defendant's negligence in putting the caps and dynamite together, packed in sawdust, in an uncovered box, was the proximate cause of the plaintiff's injury. This is a legal question, and should have been determined by the court. The legal definition of the word "proximate" is very hard for those unlearned in the law to understand, and the jury might easily be misled into the belief that any act of negligence, however remote, was the proximate cause of an accident. Cooley, Torts, 76, states the law to be: "If the original act was wrongful, and would naturally, according to the natural course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original act only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." The instruction under consideration positively violates this law, for it tells the jury that, if they believe the defendant's negligence was the proximate cause of the plaintiff's injury, they must find for the plaintiff, "although they may further believe from the evidence that the witness Davis was negligent in placing said box, so unprotected, on the tender of the engine." Although it may be carelessness to place explosive caps and dynamite together, packed in sawdust, yet, if not then in an uncovered condition, exposed to fire, no accident could possibly follow. Now, if Davis' conduct in placing the box uncovered on the tender, where it was exposed to sparks from the engine, could be regarded as innocent, and not negligent, then the plaintiff's carelessness might be held to be the proximate cause of the accident. At the time the box was turned over to Davis it was not dangerous, because not in an exposed condition. If he had negligently applied fire to the box

before he reached the tram road, he could not have recovered for an accident resulting, for his own negligence would have been the proximate cause thereof. But if he had not been aware what was in the box, and he had accidentally dropped a spark therein, and caused an explosion, he could have recovered for injury occasioned thereby, for he is innocent of wrong or negligence. The proximate cause of the injury in this case was not the placing the explosives, packed in sawdust, in a box together, but it was the placing of such box, uncovered, on the tender of the engine, where it was exposed to heat and sparks, and liable to explode to the injury of the employees of the defendant transported on such engine to their place of work. Had the box been carefully covered, or placed on some other, unexposed part of the train, no accident would have happened, although it might have been considered careless to pack explosive caps and dynamite in the same box, and cover them with sawdust. Before they will explode otherwise than by concussion, fire must reach them in some way, — either by outside application or spontaneous combustion. The latter is not claimed to have resulted. In the case of *Foley v. Railway Co.*, 48 Mich. 622, 12 N. W. Rep. 879, it was held that a railroad company transporting nitroglycerin in the customary way was not liable to its employees for injuries occasioned by the explosion thereof, as this was a risk incidental to their employment. The transporting of these explosives on the tender of an engine in an exposed condition is extremely dangerous, and is not the customary way, and cannot be considered a risk assumed by innocent employees. Had the witness Davis been the injured person, he certainly could not have complained, for his negligence contributed to the accident.

On the subject as to whether Davis, in placing the box on the tender, was acting under the direction of the defendant, the evidence is contradictory, and it was, therefore, a question for the jury to determine. But the instruction takes this question away from the jury by telling them they must find for the plaintiff, without consideration of the question as to who was guilty of negligence in exposing the explosives to the sparks from the engine. This is a matter of vital importance, and the very gist of this case; and for this reason it will have to be reversed, and a new trial awarded.

The evidence of Mrs. Schwartz that the defendant said "he did not fault Mr. Schwartz for throwing the dynamite off; he said it was all right," as heretofore shown, is immaterial, as Schwartz plainly did only what a brave man could do, under the circumstances, in an effort to save the property of the defendant and the lives of his employees. For doing this no man could "fault" him; much less

those he was endeavoring to serve. The law does not convict a man of contributory negligence because he fails to preserve himself to the injury of others through selfishness and cowardice.

For the refusal to give defendant's instruction 13a, and the giving of plaintiff's instruction No. 2, the judgment is reversed, the verdict of the jury set aside, and a new trial is awarded.

**ANDERSON v. HAYES.
TURNQUIST v. HAYES.**

Supreme Court, Wisconsin, January, 1899.

LANDLORD AND TENANT — DEFECTIVE PREMISES — EMPLOYEES OF TENANT INJURED BY FALL OF ELEVATOR. — A landlord is liable for injuries to the employees of his tenant where it appeared that an elevator used by the employees was propelled by a cable that was fastened to it by means of grooves in the top frame, over which a clamp was bolted, that the grooves were too large for the cable which slipped and the elevator fell, injuring the employees; and that the defect was known to the landlord, but only by taking off the clamp could the tenant have discovered the defect.

PLEADING. — An allegation in a complaint that the elevator would not sustain the weight which was ordinarily and usually placed upon it, but would drop to the ground, is not to be construed as meaning that the elevator fell whenever used, and hence all who used it must have known of the defect, but that it was liable to fall at any time in the course of the ordinary and necessary use thereof.

APPEALS from orders, Superior Court, Douglas County, overruling demurrers to each complaint.

These actions are actions for personal injuries, the complaints being identical. General demurrers to each complaint were overruled, and the defendant appeals. The complaint in each case charges that in 1896 the defendant erected an iron-manufacturing shop in the city of Superior, equipped with the necessary machinery, including a cupola or furnace room, an elevator, and the necessary appliances therefor, the elevator being intended to be used in connection with the furnace for the purpose of carrying ore and employees to the second floor of the building, and that it was necessary in order to operate said furnace that the elevator be so used. That about December 26, 1896, the defendant leased the premises to one Frank Hayes for one year to be used as a foundry and machine shop, and that Frank Hayes thereupon went into possession and operation of said furnace and elevator and continued so in possession

thereof until after the injuries of the plaintiffs hereinafter set forth. " That defendant was grossly careless and negligent in the construction and erection of said elevator, and in equipping, adjusting, and putting the same in position for use, and he did carelessly and negligently furnish and supply therefor and equip the same with a clamp which was not adapted for said purpose, and with a steel cable which was to be used for the purpose of holding and hoisting the same, which cable the defendant did negligently, carelessly, and defectively connect therewith, by means and through an eye or loop on top of said elevator frame, and then brought up back against the same, and there attempt to fasten the same to the cable over the said eye or loop by means of an iron clamp. That said clamp was provided with two grooves through its inside, in which said cable was laid. That the end of said cable was then brought back against said cable, above said eye or loop, and said clamp brought together and bolted fast. That the grooves therein were too large for said cable, and did not secure or hold the same, but permitted it to slip through the said gooves and become detached in the ordinary and usual course of the operation of said elevator. That by reason thereof the same was defective and dangerous, and would not sustain the weight which necessarily, ordinarily, and usually would be placed upon the said elevator, but would permit the said elevator to drop down onto the ground below. That by reason thereof the said elevator was at all times a nuisance, and imminently, necessarily, and highly dangerous to, and it did necessarily endanger, the life and limb of all persons who might be in its vicinity, as well as all persons who might use, or be employed upon, or ride thereon, and the natural and inevitable consequence to all such persons was to expose them to great and imminent danger to life and limb. That defendant did at all times know of its said dangerous condition, and of the imminent danger to which all persons above stated who were engaged thereon or thereabouts would be exposed, and in the exercise of ordinary care and diligence he could have known thereof. Upon information and belief the plaintiff alleges the said Frank Hayes had no knowledge of the defective and dangerous condition of said elevator and its appliances and fastenings, nor of the actual condition and character thereof, and that said defects and the dangerous condition thereof were concealed, and could only have been known by the persons putting the same in position in said shop, or upon a subsequent particular inspection and examination thereof. That, notwithstanding this, the defendant did carelessly and negligently lease said premises, including the said furnace room and elevator, to said Frank Hayes, and permit him

to use and operate it, as aforesaid, all of which the defendant did with the intention and for the purpose of having said Frank Hayes employ laborers thereon and thereabouts, in its active use, management, and control, as hereinbefore stated, but nevertheless the said defendant did carelessly and negligently fail and omit to inform the said lessee, or the plaintiff, of any of the said defects, or of any dangers to which such persons, in its use, operation, and management, or in and about which they would be employed, would thereby be exposed. That on March 16, 1897, the plaintiff was in the employ of the said Frank Hayes, working for him for hire, as a laborer in and about the said furnace room and elevator, and thereupon he was required to do, and it became and was his duty, in the regular scope of his employment, to take some material up in and by means of said elevator, and to ride therein up to the top of said cupola. That thereupon plaintiff did, in compliance with said order and his said duties, and within the scope of his employment, place himself and his said materials therein, and thereupon he proceeded with said elevator and its burden upwards, until it had attained a height of about fifteen feet, when, as the direct, natural, and proximate result of defendant's said negligence, wrong and unlawful conduct, as above stated, the end of said cable slipped through said clamp, and said elevator and the load therein, including the plaintiff, fell to the ground below, a distance of about fifteen feet, and caused him the injuries herein complained of. That plaintiff was at all times in the exercise of proper and ordinary care and caution, and in the usual and ordinary use and operation of said elevator, and the same was at all times used in the manner and for the purposes as by the defendant intended, and for which he leased the same. That the aforesaid dangerous and defective condition of said elevator clamp, and the fastenings of said cable thereto and thereby, and the dangerous and insecure manner in which said cable was fastened by means of said clamp, existed at the time of said leasing in December, 1896, and did so continue until after the receipt of said injuries. That said injury might reasonably have been anticipated by the defendant as the natural and probable result under the ordinary circumstances of using said elevator. That plaintiff did not at any time, until after the receipt of said injuries, have any notice, knowledge, or information of any of the said defects, or of any of the dangers or risks connected with the use of said elevator, but he believed the same to be safe and suitable for said work, and he did not, either in whole or in part, cause or contribute to said injury." The complaint further sets forth the injuries received by the plaintiff, and claims damages.

ROSS, DWYER & HANITCH and GEO. B. HUDNALL, for appellant.
O'BRIEN & VAUGHN, for respondents.

WINSLOW, J. (after stating the facts.) — These are actions by the employees of a tenant against the landlord for injuries resulting, as it is claimed, from a concealed defect in the demised premises, known to the landlord, but not known by, nor disclosed to, the tenant, nor capable of being ascertained by the tenant by a reasonably careful examination of the premises. The principle is well settled that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from lack of repair unless he has contracted to repair, or unless the defect be a concealed one known to the landlord and not disclosed to the tenant and not discoverable by the use of that degree of care which the law demands; and it is equally well settled that an employee, servant, or subtenant of the tenant has no greater rights as against the landlord than the tenant himself. *Cole v. McKey*, 66 Wis. 500, 29 N. W. Rep. 279. The rule is thus stated in *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. Rep. 117: "Where there are concealed defects attended with danger to the occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." The rule is also recognized and stated in 2 Wood, Landl. & Ten., sec. 381, and numerous cases are there cited in its support. We think the allegations of the present complaint bring the case within the rule. The concealed defect was in the size of the grooves in the clamp which held the rope above the elevator. It is alleged to have been known to the landlord and not disclosed to the tenant nor discoverable by him save upon particular inspection and examination. This we take to mean substantially taking the clamp off and examining the size of the groove, because it is evident that mere inspection from outside would not disclose the size of the groove, which was necessarily closed over the rope. We do not think that the rules of reasonable care go so far as to require the taking apart of machinery provided for such a purpose. It is argued that the allegation to the effect that the elevator would not sustain the weight which was ordinarily and usually placed upon it, but would drop to the ground, and was thereby a nuisance, must be construed as meaning that the elevator fell whenever it was used, and hence that all who used it must have known of the defect. We do not regard this construction, however, as reasonable, especially

in view of the fact that it is alleged that the plaintiffs had no knowledge of the defect in the elevator or of the dangers in its use. The allegation evidently means that the elevator was liable to fall at any time in the course of the ordinary and necessary use thereof.

Orders affirmed.

BOLTZ v. TOWN OF SULLIVAN.

Supreme Court, Wisconsin, January, 1899.

HIGHWAYS—KNOWLEDGE OF TOWN OFFICERS OF DEFECTS—HORSE SWERVING TO ONE SIDE AND WAGON WHEEL STRIKING STUMP.—While a person in the exercise of ordinary care was driving on a public highway, riding in a road cart drawn by a single horse, the horse, in order to avoid a mud puddle, or for some other reason, suddenly swerved to the right-hand path, causing the right wheel of the road cart to track outside the traveled part of the way a few inches, and strike a stump which had there existed since the original construction of the road. *Held:*

1. The following instruction to the jury was proper: "If the town officers knew, or by the exercise of ordinary diligence ought to have known, that the stump existed so near the traveled track as to render the highway dangerously defective for the use of travelers in the exercise of ordinary care, and plaintiff in the exercise of such care drove against it and was injured, the town is liable."
2. The character of the defect and the length of time it had existed were entirely immaterial except as clearly covered by the instruction.
3. The defect having existed from the time of the original preparation of the highway for public use, the town was bound to have known of its existence. Proof of notice to the town officers was not required.
4. The defect not being so far outside the traveled track that a traveler would have been obliged to have actually left such track in order to have reached it, it could not be said as a matter of law that it did not render the highway actionably defective.
5. The following instruction was proper: "You are allowed to give such damages for bodily pain and mental anxiety as you believe the plaintiff is justly entitled to recover," in connection with the instruction that, "The damages should be no greater and no less than you believe from the testimony the plaintiff is entitled to receive," the idea being that the assessment of damages should be made solely upon the testimony produced on the trial.
6. The mere accidental deviation from the traveled way, by the swerving of the horse to one side of such way to avoid a mud puddle, or deviation because of the natural inclination of the horse to travel in one of the foot paths instead of on the crown of the road, thereby causing the wheels to run outside the track for a few inches, does not come within the rule that if a person, for his own convenience and without cause, drive outside the way prepared for travel, and thereby reach an obstruction in the road and receive an injury, the municipality is not liable.

7. It is improper for counsel in a case to read law or other books to a jury, and a trial judge ought firmly to prohibit it; but if he fail to do so, the error must be regarded as harmless unless it clearly appear that the objecting party was prejudiced thereby.

(Syllabus by the Judge.)

APPEAL from judgment, Circuit Court, Jefferson County, in favor of plaintiff.

Action to recover compensation for personal injuries. The evidence, following the allegations of the complaint, showed that plaintiff, while traveling on a road in the daytime, in a roadcart drawn by one horse driven by her son, was thrown from the seat upon the dashboard and the left wheel, and seriously injured by reason of the right wheel of the roadcart striking a small stump that was concealed in the weeds a short distance outside of the right-hand wheel track. The road was an ordinary country turnpike. The tree was cut before the grading was done, and the stump, by the grading, was partially buried beneath the surface. The weeds grew up around it along the side of the road so that it was not readily observable by a traveler circumstanced as plaintiff was. The controverted questions of fact on the trial were whether the stump was so located as regards the traveled track and of such a character as to constitute an actionable defect in the highway, and whether the town officers were chargeable with knowledge of its existence. There was evidence tending to show that the stump was five to six inches from the right wheel track, was eight inches high, and seven to eight inches in diameter, and there were indications that it had been run over by wagon wheels before. There was evidence tending to show that there was a mudhole in the road near the stump and that about as the horse arrived at the place of the accident he swerved to the right to avoid the mudhole, thereby running the right wheel out of the wheel track a sufficient distance to strike the stump. There were some rulings on request to instruct the jury, and some exceptions taken to refusals to instruct. On the argument plaintiff's counsel was permitted, against objection by defendant's counsel, to read a portion of the opinion of this court in *Wheeler v. Town of Westport*, 30 Wis. 392. The verdict was for plaintiff, which defendant's counsel moved the court to vacate as unsupported by the evidence. The motion was denied and due exception was taken to the ruling. The appeal is from the judgment rendered on the verdict in plaintiff's favor.

HARLOW PEASE, for appellant.

R. B. KIRKLAND, for respondent.

MARSHALL, J. (after stating the facts). — The jury were instructed in substance that, if the town officers knew, or by the exercise of

ordinary diligence might have known, that the stump existed so near the traveled track as to render the highway dangerously defective for the use of travelers in the exercise of ordinary care, and plaintiff, in the exercise of ordinary care, drove against it and was injured, the town is liable. That appears to be faultless, but appellant's counsel complains of it, because it ignored the character of the defect and the length of time it may have existed, relying upon some language used in the opinion in *Cooper v. City of Milwaukee*, 97 Wis. 458, 3 Am. Neg. Rep. 304, 72 N. W. Rep. 1130. The point there considered was whether the court erred in instructing the jury to answer in the affirmative an interrogatory as to whether the officers of a municipality were guilty of negligence in respect to failing to repair the alleged defect, "if the sidewalk at the point in question was defective, and the jury finds the city officers knew, or ought to have known in the exercise of proper care, of the existence of such defective condition, in the absence of evidence tending to show that any steps were ever taken to remedy it." Following that is language in the opinion which the learned counsel here seeks to apply to his situation, and not without some reason. The following is the language: "This instruction was given without respect to the length of time the defect had existed, or its character." Following that are observations quite likely to mislead, at least unless viewed in the light of the precise point decided. They were based on *Duncan v. City of Philadelphia*, 173 Pa. St. 550, 34 Atl. Rep. 235, where the defect was in the cover of a coal hole, and of such a character that it was not discoverable without taking off the cover to examine it. The trial court refused to instruct the jury that the public officers could not be charged with implied notice of a defect merely from its existence if it was not discoverable without removing and examining objects apparently and properly in place, but did charge the jury that the defendant could not be held actionably negligent unless the officers knew of the defect or it had existed so long that the city would or should know it. The court, on appeal, said, the defendant had a right, on request being made therefor, to have the character of the defect pointed out, requisite to charge public officers with notice of its existence. Thus viewing the court's language with reference to the ruling condemned, that the defendant had a right to have the jury instructed that the existence of a defect not discoverable by observation without disturbing objects apparently and properly in place, is not sufficient to charge public officers with knowledge of it, the same rule is not applicable strictly to *Cooper v. City of Milwaukee*, because the court was not requested to qualify the general instruction, which, as said in *Duncan v. City of*

Philadelphia, was good as far as it went. It was a correct statement of the law and there was no error merely because it did not state qualifications or limitations, there being no request for more explicit instructions. *Weisenberg v. City of Appleton*, 26 Wis. 56; *Austin v. Moe*, 68 Wis. 458, 32 N. W. Rep. 760; *McCormick v. Loudon*, 64 Minn. 509, 67 N. W. Rep. 366; *Hanson v. Gaar, Scott & Co. (Minn.)*, 70 N. W. Rep. 853. The instruction to the jury in *Cooper v. City of Milwaukee*, was correct. It was not intended to be condemned as an erroneous statement of the law. The difficulty was that there was no evidence in the case, either of actual knowledge of the defect complained of, or defects that could reasonably have been expected to have conveyed knowledge to the public officers. The instruction was given as if there was evidence to which it could apply, as stated earlier in the same paragraph in these words: "There was no evidence to indicate any defect or tending to show that the cover was out of its socket for a sufficient length of time to have enabled the proper officers of the city to have discovered its condition and replaced it." It was want of evidence that the assignment of error under discussion turned on, and anything said in the opinion which may be construed as condemning the charge referred to therein, except for want of evidence to render it proper and which led counsel for appellant to cite the case as condemnatory of the charge under discussion here, was not so intended by the court. The charge was right as an abstract proposition of law, so the similar charge was in *Duncan v. City of Philadelphia*, so is the charge here.

The jury were instructed as follows: "You are allowed to give such damages for bodily pain and mental anxiety as you believe the plaintiff is justly entitled to recover." It is said that left on the minds of the jury the impression that they could determine the fact without the aid of evidence. That criticism is certainly not warranted in view of the fact that the language is followed immediately by the following: "The damages should be no greater and no less than you really believe from the testimony the plaintiff is entitled to receive." That was a plain, clear statement to the jury that they could award such damages for the elements mentioned as they believed the plaintiff was justly entitled to receive, determining the same, however, solely upon the testimony produced on the trial.

It is said the verdict should have been set aside as contrary to the evidence, because there was no evidence whatever to charge the officers of the town with notice of the defect if it were one. The statutory liability for injuries to persons caused by the insufficiency of a highway, under section 1339, Rev. St., is not subject to any exception found in the letter of it. It is held by courts that an

injury caused by the concurrence of a defect in a highway and contributory negligence of the injured person, cannot be attributed with reasonable certainty to either element of negligence, therefore that the principle of contributory negligence precludes a recovery in an action for damages caused by the insufficiency of a highway, the same as in any other case of the concurrence of two responsible causes; one is negligence of a wrongdoer and the other of the injured person. That is because the exception is a rule of the common law and not clearly obviated by the statute. Again, by equitable construction, going back so far in this State that it is now as much a part of the statute as if expressed therein as a qualification of it, notice, either actual or constructive, of an insufficiency happening after the construction of a highway, is necessary to fix upon the municipality liability for personal injuries caused thereby. The requisite of notice has no application, however, to defects in the original construction of a highway or to defects open and discoverable with ordinary care, in the original preparation of the road for public use. *Ward v. Town of Jefferson*, 24 Wis. 342; *Elliott, Roads & S.* 644. Hence the circumstances as to the character of the insufficiency, and the time when it was created, in this case do not fall within the exception to the statute. If it was an actionable defect, then clearly, from the evidence, it was a defect in the original preparation of the road for use, and therefore attributable to the town officers themselves, so there was no question of notice in the case for submission to the jury.

But it is said a town is not obliged to keep the whole width of the highway in a safe condition for public travel; that if it prepare a sufficient space for that purpose its duty is fully performed, and if even the road be too narrow, yet the traveler leave the traveled track without cause and thereby reach a defect and receive injury thereby. the town is not liable. That is good law, but does not appear to apply to this case. The stump was so near the traveled track that it was not necessary for the vehicle to really leave the road or course of travel in order to reach it, therefore it was at least a question for the jury to say whether the defect was actionable or not by reason of its being sufficiently near the traveled track to render the use of the space prepared for travel dangerous for persons using the same in the exercise of ordinary care. *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. Rep. 656. The evidence strongly tends to show that the defect was so near the wheel track that a mere shying of the horse or his swerving to one side for an instant, or traveling on one side as a single horse is quite liable to do, and at least without negligence on the part of the driver as a matter of law, was liable to cause the

wheel to strike it with dangerous results to the occupants of the vehicle. The evidence tends to show that such was the way in which the accident happened. The trial court could not say as a matter of law that the case was within the rule that where a person voluntarily diverges from the traveled track without reasonable cause he assumes the risk of his conduct. There is evidence here that the horse suddenly shied or swerved to the right-hand side of the road in order to avoid a mudhole and thereby ran the right wheel a few inches outside of the wheel track and against the stump.

What has been said covers all the assignments of error made by appellant's counsel, except that the court permitted plaintiff's counsel to read to the jury an extract from the opinion of Chief Justice Dixon in *Wheeler v. Town of Westport*, 30 Wis. 392. That was objected to and the court, after ruling that it was improper, said, in effect, that the reading might proceed as a part of the argument of plaintiff's counsel, but at his peril. We should say here in passing, with due respect for the learned judge who presided at the trial, that for the instant he hardly met with proper judicial firmness the situation presented. The reading proposed was not proper. The court appreciated that fact and so ruled, and then laid aside for the moment that judicial order which should at all times govern a trial, and informed counsel that he might put error into the record if he chose, but must take the consequences. It is permissible and excusable for courts to err if done honestly and inadvertently. All do it, none are infallible; but duty to litigants and the careful administration of the law are inconsistent with knowingly permitting, against proper objections, improper conduct on a trial at any point, even if the trespasser upon the rules be willing to take his chances on the result in his favor being disturbed because of such conduct.

The reading of legal opinions or the law as laid down by text-writers, or reading from other books or papers, for the purpose of influencing a jury in a case on trial is generally held to be improper. Facts are to be established by evidence given in court from the mouths of witnesses, or depositions taken out of court, or papers and records and things properly produced. The law applicable to the case is to be pronounced by the trial court upon the bench. The arguments of counsel to the jury are to be confined to reasoning, and the drawing of deductions from the evidence in the light of the law as counsel assumes the court will pronounce it. In that light he is to reason from the evidence as to the facts which, to his mind, such evidence establishes, and which the jury should say it establishes. The following authorities may be referred to, among the numerous decisions of courts on the subject of reading from law

books and the decisions of courts, or other books, to juries: *Baker v. City of Madison*, 62 Wis. 137, 22 N. W. Rep. 141, 583; *Mullen v. Reinig*, 72 Wis. 388, 39 N. W. Rep. 861; *Boyle v. State*, 57 Wis. 472, 15 N. W. Rep. 827; *Ashworth v. Kittridge*, 12 Cush. 193; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. Rep. 882; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Brown*, 121 Mass. 69; *Whiton v. Insurance Co.*, 109 Mass. 24; *Huffman v. Click*, 77 N. C. 55; *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606, 16 S. E. Rep. 819; *Railway Co. v. Wesch* (Tex. Civ. App.), 21 S. W. Rep. 62; *Steffenson v. Railway Co.*, 48 Minn. 285, 51 N. W. Rep. 610; *Railway Co. v. King*, 88 Ga. 443, 14 S. E. Rep. 708; *Williams v. Railway Co.*, 126 N. Y. 96, 26 N. E. Rep. 1048; *Humbarger v. Cary* (Ind. Sup.), 44 N. E. Rep. 302; *Stratton v. Dole* (Neb.) 63 N. W. Rep. 875; *Telegraph Co. v. Teague* (Tex. Civ. App.), 27 S. W. Rep. 958; *Publishing Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. Rep. 238; *Dillingham v. Wood* (Tex. Civ. App.), 27 S. W. Rep. 1074; *Wolf v. Shannon*, 50 Ill. App. 396; *Edwards v. Common Council of Village of Three Rivers*, 96 Mich. 625, 55 N. W. Rep. 1003.

It will be seen by an examination of the cases cited that while the reading of law to a jury is generally condemned, it is generally held not reversible error, unless the jury be thereby prejudiced, or it appear clearly that such was probably the effect. That is obviously the rule that should govern here in view of section 2829, Rev. St., which provides that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect a substantial right of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. The significance of that provision has often been referred to by this court. Dixon, Ch. J., in *Decker v. Trilling*, 24 Wis. 610, observed that it is a beneficent statute and cures a multitude of errors, as numerous cases in which it has been acted upon by this court will show; and in *Pooler v. State*, 97 Wis. 627-638, 73 N. W. Rep. 336, it was remarked that the intent of the statute should always be recognized and given its legitimate effect to the end that justice be made certain and speedy instead of being unnecessarily delayed and made burdensome to parties by disturbing judgments, where a complaining party has in no way been prejudiced as to any substantial right.

Looking at what counsel for respondent read to the jury, which is the subject of the assignment of error, we are unable to see clearly how appellant could have been prejudiced thereby. There was first a correct statement of the legal test of liability for negligence, which was followed by a substantially correct quotation from the statute as

to the liability of towns to persons injured while traveling on public ways, if injured by the insufficiency thereof; then a correct statement of the duty of towns to make and keep their highways reasonably safe, and that a highway is not sufficient if not reasonably safe; then followed an accurate quotation from Chief Justice Dixon's language in the Westport Case as to conditions, naming them, which may render a highway insufficient under some circumstances and not under others, closing with the words: "It is with respect to conditions and considerations like these, and others which will readily suggest themselves, that highways are stated to be safe and sufficient, or unsafe and insufficient, according to circumstances." If the counsel had argued that, as a matter of common sense and common knowledge, the considerations named were the proper tests of the sufficiency of a highway, and put the statement of the law on counsel's assumption as to its correctness, and as to what the court would instruct the jury from the bench, and made his deductions from all the evidence from premises thus stated, it would not be claimed, we apprehend, that such conduct constituted reversible error if error at all. The mere fact that the same language was used by quoting from a legal opinion cannot be said to so far change the situation as to constitute prejudicial or reversible error, inasmuch as all that was said, if stated as the language of the counsel, legitimately applied to the case. By this we by no means approve the proceeding of the trial court. We disapprove of it, yet it is one of many matters liable to occur in trials, which, though out of harmony with correct methods, do not warrant punishing parties by reversing their judgments. This court can go no further in such situations than to express disapproval and hold the error harmless, leaving trial courts to make their own standard of strictness as to the observation of settled rules and methods of procedure in conducting trials, so long as no substantial right of a complaining party be injuriously affected thereby.

The judgment of the Circuit Court is affirmed.

STRICKER v. TOWN OF REEDSBURG.

Supreme Court, Wisconsin, January, 1899.

HIGHWAYS — DEFECTS — STUMP DRIVEN AGAINST. — A town is not liable for injuries received from being thrown from a wagon that was driven over a stump beside a highway where it appeared that the plaintiff

was driving in a temporary track outside the highway when there was no need of so doing (1).

VERDICT — INCONSISTENT FINDINGS. — A finding by the jury that the road at the point where the accident occurred was reasonably safe, and another that the stump was an obstruction that made the highway defective, were not so inconsistent as to justify the court in committing the case again to the jury.

EVIDENCE. — Where it was shown that a highway existed only by user, it was error to admit evidence that if fences were extended in a straight line to the place of the accident, a stump that was the cause of the accident would be in the highway.

APPEAL from judgment, Circuit Court, Sauk County, in favor of plaintiff. Pending the appeal the plaintiff died and her administrator was substituted.

This is an action to recover damages for personal injuries received by Conradina Stricker in her lifetime in consequence of being thrown from a wagon on the highway in the defendant town. She obtained a judgment in the Circuit Court, but, pending the appeal to this court, she died, and the plaintiff, being the administrator of the estate, has been substituted as the plaintiff in this court. The evidence upon the trial showed that the deceased was riding with her husband in a lumber wagon on the highway in the defendant town about two miles northwest of the city of Reedsburg, somewhere between five and six o'clock on the evening of November 6, 1895. The highway where the accident occurred was unfenced for some distance, and was a highway by user alone, and the questions chiefly litigated were as to the limits of the highway, and whether a certain stump, against which the right wheel of the wagon struck, throwing the plaintiff and her husband out of the wagon, was an actionable defect in the highway. The road ran practically north and south, and at the place of the accident it appeared that there had been for many years a clear space, twenty-six feet in width, between a certain clump of trees on the west and the stump in question on the east, which had been used by the public for more than twenty years as a road, and

1. In *TILTON v. INHABITANTS OF WENHAM* (*Supreme Judicial Court, Massachusetts, January, 1899*), 52 N. E. Rep. 514, it appeared that while the plaintiffs were driving along a road their wagon struck a stump ten inches high and six and a quarter inches in diameter that was hidden by the grass and they were thrown out and injured; that the road was a highway by prescription and its width was not shown

but it did not extend to the fences on the sides; that owing to a muddy place travel had turned to the side of the road and worn bare a strip three or four feet wide which looked like the rest of the road, and came to within an inch of the stump. *Held*, that the question whether the stump was within the limits of the highway was for the jury.

that it was smooth and in good condition, and contained two traveled tracks, one of which ran within a few inches of the stump. It further appeared that, at times when the road was wet and muddy, a temporary track existed east of the stump, caused by travel which went that way on account of the mud in the ordinary traveled tracks. On the night in question the deceased, with her husband, left the city of Reedsburg shortly after dark, the husband driving. They proceeded safely until they reached the road in question, and the evidence shows that the husband of the deceased was well acquainted with the road, and before reaching the stump was driving in the temporary track which then existed to the east of the stump. Just before reaching the stump, a team driven by another farmer came up behind them, and the horses driven by the plaintiff's husband were suddenly turned from the east track towards the main traveled track between the stump and the trees. The turn was not made quick enough, however, and the right forward wheel of the wagon struck the stump with such force as to break the tongue and wheel, and throw the deceased and her husband upon the ground. The horses were an ordinary farm team and were under control at the time. A special verdict was demanded, and ten questions were submitted to the jury for answering, with instructions allowing them to bring in a sealed verdict. Upon the following morning, upon the assembling of court, the sealed verdict was presented, and was opened by the court and read, whereupon the following proceedings took place: "Court. I will have to explain to you, gentlemen of the jury, that your answer to question two, 'Was the highway as established at the place and at the time of the accident a reasonably safe one for a person to travel on while in the exercise of ordinary care?' to which you say, 'Yes;' and your answer to the other question, bearing upon the same subject, number six, 'Was the stump in question an obstruction to the highway as established, so as to make it defective and in want of a proper condition of repair at the place of the accident?' to which your answer is also, 'Yes,' — that those two answers are inconsistent. They bear upon the same subject. In the first question you find that it is a reasonably safe road, and the conclusion from the second finding is that it is not a reasonably safe road; so I shall have to ask you to return and deliberate upon those two questions, and inform the court what your finding really is as to those questions." The jury again retired, and after a time returned into court, and the following proceedings took place: "Foreman: Your honor, we wish to know, as to the question numbered two, whether that means the general highway along there or that particular place. We thought it meant the general highway.

Court: I will explain that to you. According to the scope of the question number two, and under the instructions I gave you, that included the question of this stump, with reference to the traveled track and the use of that highway; and, you having found that the stump was an obstruction and made a defective road, that must be considered in the question that you also have to consider in question number two. For that reason, the two answers are in conflict, and it is for you to say which fact you find, — either the one you answer in two or the one you answer in six.” The jury again retired, and afterwards returned into court, and the following proceedings took place: “ Court: You now report your answer to question number two as follows: ‘ Was the highway as established at the place and at the time of the accident a reasonably safe one for a person to travel on while in the exercise of ordinary care? Answer. No,’ — leaving the answer to question number six as it was. So say you all? Jury. Yes.” The special verdict is as follows: “ 1. Was the stump in question within the limits of the highway, as established at the place of accident? Ans. Yes. 2. Was the highway, as established at the places and at the time of the accident, a reasonably safe one for persons to travel on while in the exercise of ordinary care? Ans. No. 3. Was there a regularly traveled track northeast of the stump in question at the time of the accident? Ans. Yes. 4. If your answer is ‘ Yes ’ to the last question, then state how long such track had theretofore existed. Ans. From August, 1895, to time of accident. 5. At what distance from the stump in question did the team leave the track it was traveling on? Ans. About fifteen feet. 6. Was the stump in question an obstruction to the highway, as established, so as to make it defective, and in want of a proper condition of repair, at the place of accident? Ans. Yes. 7. If your answer is ‘ Yes ’ to the last foregoing question, then was such defect and want of repair the direct cause of the plaintiff’s injury? Ans. Yes. 8. Was the plaintiff, or her husband, William Stricker, guilty of the want of ordinary care which directly contributed to cause the accident and produce the injury she complains of? Ans. No. 9. If, upon the special verdict, the court determines that the plaintiff is entitled to a judgment in her favor, at what sum do you assess her damages? Ans. One hundred seventy-five dollars and fifty cents (\$175.50). 10. Do you find for the plaintiff or for the defendant? Ans. For the plaintiff.” From this verdict, judgment for the plaintiff was rendered, and the defendant appeals.

HERMAN GROTOPHORST and PATRICK DALY, for appellant.

JAMES A. STONE, for respondent.

WINSLOW, J. (after stating the facts). — It seems clear to us that this judgment is erroneous, and must be reversed, for several reasons.

1. There is no question in this case but that there was a highway by user, at the place of the accident, twenty-six feet in width, between the clump of trees on the west and the stump in question on the east. It appeared that this whole twenty-six feet was in good condition for travel at the time of the accident. It further appeared that at times there was a temporary track used east of the stump, but the proof entirely failed to show that this temporary track was ever used long enough or continuously enough to constitute it a part of the highway, and the jury found that this track had only existed a few months at the time of the accident. So the evidence showed, without material contradiction, that the highway consisted simply of the space between the trees on the west and the stump on the east, and no more, because the principle is familiar that a highway by user alone extends no further than the use which has created it. Thus the stump in question appears affirmatively to have been outside of the limits of the highway proven. It does not necessarily follow that the stump does not constitute an actionable defect because it was outside of the way established by user. If it was so close to the traveled way that a traveler using the traveled way, and exercising ordinary care, is still liable to suffer injury therefrom, then it will be a defect. *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N. W. Rep. 656; *Slivitski v. Town of Wein*, 93 Wis. 460, 67 N. W. Rep. 730. But it can only be a defect as to one who is lawfully using the prepared way and exercising ordinary care. If one is not using the way, but is voluntarily deviating therefrom upon adjoining lands, and runs into such an obstruction while returning to the way, he cannot recover. That is just what the evidence shows that the intestate's husband was doing in the present case. He had voluntarily driven his team out of the limits of the highway, upon the temporary track to the east, when no necessity existed for such deviation, and when returning to the traveled track of the highway his wagon ran against the stump, and the injuries complained of were suffered. In such a case there can be no recovery. *Goeltz v. Town of Ashland*, 75 Wis. 642, 44 N. W. Rep. 770.

2. The jury first returned a verdict which the court thought to be inconsistent. By their answer to the fourth question they said that the road was a reasonably safe one, and by their answer to the sixth question they found that the stump made the highway defective. As said in *Blesch v. Railway Co.*, 48 Wis. 168, 2 N. W. Rep. 113: "The power to refer the verdict of a jury back to them for further

consideration must have some limits, and the exercise of this power has always been looked upon with disfavor, except where it is exercised for the purpose of allowing the jury to perfect a verdict which is imperfect by reason of their omission to make some computation of interest or the amount due on some contract." It is only such a palpable error, mistake, or omission which can be corrected in this way, — something which is plainly a mere clerical or formal mistake. But, where the jury have found upon all issues submitted to them, the court is not empowered to call their attention to real or supposed inconsistencies in their answers, and again send them out to change their answers or to make them consistent. We think the inconsistency here was not so plainly a mistake or misapprehension of the jury as would justify the court in committing the case again to the jury. *State v. Clementson*, 69 Wis. 628, 35 N. W. Rep. 56.

3. As has been before said, there was only shown a highway by user at the place of the accident, and the limits of a highway by user are determined by the limits of the user. In the present case, testimony was received, against objection, as to the direction of the fences at a considerable distance from the place of the accident, with the purpose of showing that, if such fences were extended in a straight line to the place of the accident, the stump would be in the highway so bounded. This was plainly error, because such fences cut no figure in fixing the limits of a highway which was such simply by user. *Elliott, Roads & S.*, p. 291. It does not seem necessary to refer in detail to other assignments of error. It is believed that what has been already said sufficiently indicates the principles of law applicable in the case to guide the trial court upon a new trial.

Judgment reversed, and action remanded for a new trial.

CITY OF DENVER ET AL. V. SHERRET.

Circuit Court of Appeals, United States, Eighth Circuit, June, 1898.

CITIZENSHIP — JURISDICTION. — The court below had jurisdiction because of the diversity of citizenship of the parties where it was shown that the defendants were Colorado corporations and the plaintiff a resident of Kansas, where she had always resided as a member of her father's family until she went to Denver, Colo., to endeavor to secure a position as teacher, but intending to return to Kansas if she failed to pass the examination, and before the result of the examination was known sustained the injuries for which this suit was brought, and when sufficiently recovered, returned to her father's family in Kansas, where she remained.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE ELECTRIC LIGHT POLES IN STREET. — The fact that a city permits the erection and operation of an electric light plant in its streets will not charge the city with the duty of inspecting the poles, wires and lamps connected therewith and maintaining them in a safe condition for the protection of persons using the streets; but it is liable only after notice of defects, actual or constructive.

PRACTICE—MOTION TO ELECT. — A motion requiring the plaintiff to elect which defendant she would proceed against on the trial of an action against two joint tort feasons being within the discretion of the court, its action is not reviewable on appeal.

INSTRUCTION—INSPECTION OF POLES. — An instruction that the electric light company was required to know that timber will decay, and was required to make such examination and inspection of its poles from time to time as would "determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use," was misleading, as it was so phrased that the jury must have understood that the electric company was bound to make such an examination that all defects would certainly be discovered.

NOTICE OF DEFECT THOUGH EMPLOYEE FAILED TO REPORT. — An instruction that the knowledge of the defective condition of an electric light pole gained by an employee, whose duty it was to inspect, was notice to the company whether he reported it or not, was proper.

CONTRIBUTORY NEGLIGENCE. — The plaintiff was not guilty of contributory negligence in walking diagonally across the street when struck by a falling electric light pole and wires, there being no evidence that would charge her with notice that there was greater danger in crossing that way.

DAMAGES—HOW JURY TO DETERMINE AMOUNT. — From facts given in the evidence it is for the jury to award such fair sum as will in their judgment compensate the party for the decreased or destroyed ability to earn money in the future, but the rule is not that the jury must determine the number of years that the disability will continue to exist and then multiply this number by the yearly compensation the party has earned in the past.

ERROR to Circuit Court of United States for the District of Colorado.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge. The opinion states the case.

T. J. O'DONNELL (MILTON SMITH with him on the brief), for plaintiffs in error.

D. V. BURNS, for defendant in error.

SHIRAS, District Judge. — This action was brought in the Circuit Court for the District of Colorado by Louise Sherret, the defendant in error, against the city of Denver and the Denver Consolidated Electric Company, to recover damages for personal injuries caused her by the falling of an electric-light pole to which were attached the wires which supported a lamp used in lighting the city streets.

In her petition the plaintiff, as ground of jurisdiction, averred that she was a citizen of the State of Kansas, and that the defendants were corporations created under the laws of the State of Colorado. In the answers filed the defendants took issue on the averment of the citizenship of the plaintiff, claiming that she had become a citizen of the State of Colorado. The issue thus made was heard and determined before entering upon the merits of the case, and upon the conclusion of the evidence adduced on that issue the court instructed the jury to find thereon in favor of the plaintiff, and this ruling is now assigned as error. The point at issue was of what State the plaintiff was a citizen when this action was brought, on the 29th day of October, 1897. The evidence showed without dispute that the plaintiff had been born in Hiawatha, Kansas, and had lived there all her life as a member of her father's family, being engaged as a teacher in the public schools of that place until in May, 1897, she went to the city of Denver for the purpose of endeavoring to secure a position in the schools of that city, and she and her father both testified that, if she failed in securing such position, it was her intent to return to Kansas and continue her occupation as a teacher in Hiawatha. On the 21st and 22d days of June, 1897, she underwent the requisite examination before the school board of Denver, but before the result was known she was injured as stated, and, when sufficiently recovered, she returned to her father's house in Hiawatha, and since that time has continued to live at Hiawatha as an inmate of his family.

The utmost that could be fairly claimed under the evidence in this case is that it was the purpose of plaintiff to change her place of residence from Hiawatha to Denver in case she was successful in obtaining a position as teacher in the schools of the latter city; but this position was not obtained, and the plaintiff still continues to be a member of her father's family, at Hiawatha. Clearly, therefore, there was not any evidence in the case which would have sustained a finding that on the 29th day of October, 1897, the plaintiff was a citizen of the State of Colorado, and had ceased to be a citizen of Kansas; and, this being true, the court did not err in directing a verdict on this issue in favor of plaintiff, thus sustaining the jurisdiction of the court.

Upon the merits of the case, it appeared from the evidence that the Denver Consolidated Electric Company, under an ordinance of the city of Denver, had obtained the authority to place in the city streets the poles and wires necessary to enable it to furnish electricity for lighting purposes; that, in pursuance of this authority, it had maintained at the intersection of Seventeenth and Stout streets a

pole and wires, and also a lamp attached to wires, for the purpose of lighting the street; that on the 22d day of June, 1897, this pole fell down, carrying with it the wires attached thereto, which struck the plaintiff, who was then crossing the street, and severely injured her. The plaintiff further introduced evidence tending to show that the pole had been erected for a number of years; that it had become rotten in the part subjected to the dampness of the earth, which condition could have been readily discovered by proper examination of the pole; and it was claimed on behalf of plaintiff that both defendants had been guilty of negligence in thus allowing the pole to remain in the street after it had become rotten. Both the city and the electric company are joined as defendants to the action, but it will probably aid in a clear understanding of the questions involved if the case is viewed — First, as an action against the city alone, and, second, as one against the electric company.

In defining the legal duty imposed upon the city, the court charged the jury that:

“The city of Denver, as a municipal corporation, is charged with the duty of keeping the streets in a safe condition. If it does anything directly to render them unsafe, it is liable in damages for the act. If it permits another to do anything which renders the streets unsafe, it is liable, and the person doing it will be liable in the same degree. If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter.”

Exceptions were duly taken to the cited portions of the charge of the court, and we have thus presented the question whether the charge correctly states the duty imposed by the law upon the city with respect to the poles placed in the streets of the city by the electric company. The court instructed the jury that, as the city was charged with the duty of keeping the streets in a safe condition, it was charged with the duty of inspecting the poles from time to time, in order to ascertain their condition, and, in effect, the court laid down the rule that the city was bound to do all that would have been required of it had the city itself been the owner of the electric plant, including the poles used in connection therewith. If this liability exists with respect to the poles erected in the streets, it must also exist with respect to the wires and lamps attached thereto, for it will be remembered that it is not claimed that the mere erection of the pole which fell created an unlawful obstruction of the

streets, but the theory of the trial court was that, as the city permitted the electric company to erect the pole as part of its lighting system, the city was charged with the duty of inspection by reason of the duty of the city to keep the streets in a safe condition, and therefore, as the city permitted the electric company to string its wires along the streets and hang its lamps over the same, the same duty of inspection must exist with respect to the wires and lamps as exists with respect to the poles. It is well known that in the development of urban life city streets are now used, under legislative sanction, for many purposes other than for the passage of persons, animals, and vehicles along the same. Underneath the streets may be placed conduits for the conveyance of water and gas, while above ground are found telegraph and telephone wires, electric light and power wires, and electric street-car wires, all suspended along and over the streets, and experience has demonstrated that the presence of these wires creates a new danger in the use of the public highways. If what is called "a live wire" becomes broken and falls into the street, it may cause the death of all persons or animals coming into contact therewith. So also it has been demonstrated that in the running of cable cars through the streets of a city a danger is created to the public in that occasionally the machinery forming the grip does not properly act, and the car cannot be stopped, but may be dashed into other vehicles, causing injury to persons and property, or the cable itself may become defective and thus cause an obstruction to the free use of the street. If the ruling of the trial court in this case is sustained, to the effect that, because the city permitted the electric company to erect the pole in the street as part of its electric system, the city became charged with the duty of inspecting the pole just as if it were owned and operated by the city, then it must follow that, because a city permits the use of its streets for telegraph, telephone, electric light, and power systems, as well as for the use of cable and electric street-car systems, the city is charged with the duty of inspecting all the poles, wires, lamps, cables, and cars used in connection with these systems in the public streets, in order to prevent obstructions being caused to the safe use of the street through defects in the appliances used for these several purposes. The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection, but it is apparent that inspection is merely a means to an end, and if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement that "if the city had erected this pole

which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Thus, the jury were instructed that they must view the case just as they would be required to do if it appeared that the city had itself erected the pole as part of a lighting system erected, owned and operated by the city. Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition. The charge given to the jury was to the effect that the obligation resting upon the city was just the same as though the city had erected and owned the pole; that, therefore, it was under obligation to inspect the pole from time to time, to the end that it should be kept in a safe condition; and that if, through the failure to properly inspect the same, it was allowed to become rotten and fall, the city would be liable for the results thereof. If this is a correct statement of the law, it follows that with respect to all the appliances in the shape of poles, wires, lamps, cables, and the like placed in the city streets, by telegraph, telephone, electric light, electric power, electric and cable street-car companies, there rests a primary duty and obligation upon the city to keep them in safe condition, and to make the inspections necessary to detect defects in order that the same may be promptly repaired. If this duty rests upon the city, then it will be compelled to keep in its employ men who possess the knowledge and skill needed to detect, and, when detected, to repair and keep in proper condition, the electric wires and the cables and other appliances used in the streets; and it is apparent that this would, of necessity, lead to a conflict, in many instances, between the city and the companies owning and operating the electric and cable plants. In support of the charge of the court upon this point, counsel for the defendants in error cite a number of cases decided by the Supreme Court of the United States and the Supreme Court of Colorado, in which the duty of inspecting the streets is recognized; but they are all cases based upon defects in bridges, sidewalks, or carriageways, wherein the primary duty of erecting and maintaining the same, as part of the highway, was upon the city, and wherein

the duty of inspection exists, because the duty of keeping in repair rests primarily upon the city; but none of these cases involved the point now under consideration. In this case, the trial court held, and the contrary is not contended for by counsel for defendant in error, that the original erection of the pole was lawful, and did not constitute an obstruction in the street; and therefore the question is narrowed down to the point whether the city is bound to inspect from time to time all poles, wires, lamps, and cables that may be lawfully placed in the streets for defects therein and to repair such defects in order to prevent their becoming an obstruction to the safe use of the streets, or whether the rights of the public are not sufficiently protected by imposing the duty of keeping watch over these appliances upon the corporation or person owning and operating the same, and holding the city liable only in cases wherein, after actual or constructive notice of the existence of danger to the public in the use of the street, growing out of or caused by some defect in the poles, wires, or other appliances, the city does not use diligence in obviating the danger thus created. Believing this to be the extent of liability incurred by the city under such circumstances, it follows that the trial court erred in holding that the same rule must obtain as would be applicable if the city had itself erected the pole for its own purposes.

Coming now to a consideration of the errors relied on as grounds for reversing the judgment against the electric company, the first one presented is that the trial court erred in overruling the motion made by the defendants when the case was called for trial that the plaintiff be required to elect whether she would proceed against the city of Denver alone or against the electric company alone, on the ground that the defendants were not joint tort-feasors and were not jointly liable to the plaintiff. In form the complaint charges the defendants with a joint liability. The defendants did not, by motion or demurrer, present the question whether they were properly joined in the action, and in the answers filed no issue or question of this nature was presented. The case coming on for trial, the defendant then moved that the plaintiff be required to elect whether she would proceed against the city or the electric company, which was in effect asking the court to order separate trials. As the record then was, this was but an appeal to the court to exercise its discretion in determining whether there should be separate trials of the issues presented by the answers. If the motion had been granted and the plaintiff had elected to proceed against the city, the case would still be left pending against the electric company, as the motion did not ask a dismissal of the case as against either

defendant. Motions of this character, being but appeals to the discretion of the trial court in regulating the order of trial, do not usually present questions upon which an appeal lies, and this case is not an exception to the general rule.

The principal grounds relied on for a reversal of the judgment against the electric company are found in the charge of the court touching the duty of the company with respect to the pole erected by it, it being claimed on behalf of the plaintiff in error that the court in effect made it the duty of the company to exercise such a supervision of the poles forming part of its system that it would certainly detect defects therein rendering the poles unsafe. It will be remembered that negligence against the company was charged in two particulars, — first, that the company failed to properly inspect the pole from time to time, and that thus it was allowed to become rotten and unsafe; and, second, that some days before the pole fell actual notice of the unsafe condition of the pole was brought home to the company, and, with this notice, the company neglected to make it safe. The portions of the charge to which exceptions were taken are as follows:

“ The pole in question was unquestionably a good one when it was erected. It was large enough, and apparently strong enough. If it had broken down immediately, no negligence could be imputed either to the city or to the company on account of the fact. If it had been overthrown by a great storm, as sometimes happens, immediately after its erection, there would be no act of negligence imputable either to the city or the electric light company in respect to it. But it was charged and alleged in the complaint that it was allowed to stand for such time that it became decayed and weak, and that it fell in consequence of such weakness. If this is a fact, and no measures were taken either by the city or the electric light company, to ascertain its condition, or if the measures were not effectual, if they were not such as should have been taken to ascertain the condition of the pole, then the liability exists in the same manner. * * * The defect which existed in it, if there was such defect, being rotten at the surface of the ground or below the ground, was one which was not open to ordinary observation. If there was a shell which was not decayed, it would be necessary to penetrate the shell in order to ascertain the condition of the heart of the pole. Whether anyone on behalf of the city or on behalf of the company made any such examination, within a reasonable time, as was needful to ascertain its condition, is a question for your consideration. In putting up the poles in the street, it was undoubtedly a duty resting upon the city, and upon the company which erected

them, to examine them from time to time, as often as may be necessary, to ascertain their condition. Decay in timber is natural. We all know what it is. We know it from the ordinary experience of our lives, and it is a circumstance of which all parties concerned in these matters are bound to take notice. They are required to know that timber will decay, and are required to make such examination and inspection from time to time as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use. If you are of opinion that the examinations, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were, in fact, made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action. The only liability of the city with respect to the poles erected in this manner, when it was apparently safe on the outside when it was first put up, was to inspect from time to time to ascertain whether it had fallen into a condition which rendered it unsafe."

In the latter part of the charge the jury was instructed that, unless there was negligence on part of the company, it would not be liable; that negligence would consist in a failure to inspect and examine the pole with sufficient care and diligence. And in the first part of the charge it was declared to be the duty of the company to take effectual measures to ascertain the condition of the pole; that the company was required to know that timber will decay, and was required to make such examination and inspection, from time to time, "as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use." It may be true, as is claimed on behalf of the defendant in error, that the court did not intend to impose upon the company a duty beyond that of exercising ordinary care in the maintenance of the poles forming part of its electric light plant; but the question is whether the jury would not naturally construe these instructions to mean that the company was bound to make such an examination and inspection from time to time as would determine and ascertain whether decay had in fact taken place. Giving the language used its natural import, it certainly does impose upon the company the duty of making such examination from time to time as will ascertain and determine whether the poles have become decayed, and it is then declared that a failure to make such an examination constitutes negligence on part of the company. The evidence in this case showed that the decay which affected the strength of the pole was not upon the surface, and therefore was not open to ordinary observation,

and, applying the instructions given to the facts proven, the jury could only understand from the instructions given that the company was bound to make such an examination of the poles as would be effectual to discover decay existing underneath the surface. In defining the liability of the city, the court charged the jury that, if "the examinations, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole and were in fact made by them, and that the defect in the pole, if any there was, was not discovered by such examinations, then the city cannot be liable in this action." No such instruction was given with reference to the electric company, and there seems no escape from the conclusion that the charge was faulty and misleading in that it failed to properly define the duty resting upon the company with respect to the maintenance of the poles by it lawfully placed in the city streets, in that it was so phrased that the jury must have understood that the company was bound to make such an examination that all defects would certainly be discovered, instead of being bound to use reasonable and ordinary care in the supervision and inspection of the poles placed in the streets. By this ruling it is not meant to relieve the company from a faithful performance of its obligations to the public. In all cases wherein telegraph, telephone, electric light and power, and electric-car companies obtain and exercise the privilege of erecting and maintaining poles, wires, lamps, and other appliances in the public streets, they are bound to know that the maintenance of such appliances in and about the highway may create dangers to persons exercising the primary and paramount right of passage along or across the same. The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of the appliances pertaining to the business carried on by the companies, but they are bound to know the dangers which may naturally be caused by such use of the streets, and to guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. If the court in its instructions had not overstepped this line in defining the obligation resting upon the electric company, we would not feel compelled to hold that error had been committed, but, as we view it, the court used language which the jury might well construe to mean that practically the company was bound to make such an examination of its appliances as would certainly secure a discovery of all hidden defects therein, which extends the duty resting upon the company beyond the limit which the law imposes upon the company.

It is also assigned as error that the court charged the jury that if Blake, who was an employee of the company, made an examination of the pole, and discovered its rotten and unsafe condition, this would be notice to the company, whether he communicated this knowledge to any officer of the company or not. Blake was called as a witness for the defendant in error, and he testified that he was in the employ of the electric company as a lamp trimmer, it being his duty to trim the lamps, report the "outs," put in carbons, and to report anything that looked bad, — to report any trouble. He further testified that, some ten or fifteen days before the pole fell which injured Miss Sherret, he examined the pole with a screwdriver, and found "that the screwdriver went in pretty easy, and showed that it (the pole) was pretty rotten," and that he was led to make this examination from seeing the pole "wriggling." He further testified that he notified Mr. Sheridan, a storekeeper of the company, of the fact he had discovered. Mr. Sheridan, being called as a witness, denied receiving such report or notice from Blake. Mr. McSparrin, the line foreman of the electric company, and Mr. Barker, the superintendent, both testified that it was Blake's duty to report any defects he discovered either to the foreman or the superintendent, and both witnesses denied receiving any report of the defect in the pole from him. The court instructed the jury that, if they found from the evidence that Blake did in fact examine the pole and discover the unsafe condition thereof at the time he stated in his testimony, this would be notice to the company, regardless of the question whether he made a report thereof to any other employee or officer of the company, and this ruling is assigned as error.

In Thompson on the Law of Corporations (volume 4, sec. 5195) the rule is stated to be to the effect that, in order to bind the principal, the notice must be communicated to one whose duty it is "to act for the principal upon the subject of the notice, or whose duty it is to communicate the information either to the principal or to the agent whose duty it was to act for him with regard to it." Counsel for the electric company, in the brief submitted, state their view of the rule in the following terms: "The general rule with reference to the question of notice is that notice to the agent is notice to the principal, if the agent comes to a knowledge of the facts while he is acting for the principal; but this rule is limited by the further rules that notice to the agent, to bind the principal, must be within the scope of the employment," — and cite in support thereof the cases of *The Distilled Spirits*, 11 Wall. 356, and *Rogers v. Palmer*, 102 U. S. 263. In the former case it was said that "the general rule that a principal is bound by the knowledge of his agent

is based on the principle of law that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty; " and in the latter case it was held that knowledge obtained by an attorney when conducting a case for a client was imputable to the latter.

As already stated, Blake testified that it was his duty to report anything wrong or any trouble he discovered about the poles or wires of the company; and none of the witnesses for the electric company denied this fact, but on the contrary McSparrin and Barker, the line foreman and the superintendent, both testified that it was Blake's duty to report to them any defects he might discover, and thus it was made plain that it was Blake's duty to take notice of defects in the plant coming under his observation and to report the same when discovered, and therefore, within the doctrine of the authorities cited, the court was justified in instructing the jury that knowledge acquired by Blake of the defective condition of the pole when he was going his rounds as an employee of the company would be imputable to the company, because it was proven beyond dispute that it was his duty to take notice of defects, and, noticing them, to make report thereof.

A number of errors are assigned upon the action of the court in permitting testimony to be given with respect to the mental and physical condition of the defendant in error prior to the accident and her condition after the injury, but we find no error therein, and it is not necessary to discuss them at length.

Exception is also taken to the ruling of the court upon the defense interposed of contributory negligence, which was to the effect that there was no evidence sustaining the defense. The charge of negligence on part of the defendant in error was based upon the fact that when she attempted to cross the street at the time of the accident, she did so diagonally, thus leaving the crossing usually followed by pedestrians, it being claimed that, had she been upon the crossing proper, she would not have been struck by the falling pole and wires. To maintain the defense of contributory negligence under these circumstances it would be necessary to hold that the defendant in error had no legal right to cross the street diagonally, and that she was a trespasser in thus going upon it. In support of this contention counsel for the plaintiffs in error cite a number of cases wherein it was held that it was a question for the jury to determine whether the party injured was negligent in the use made of the street or highway; but these are cases wherein the charge of negligence against the defendant corporation was a failure to keep the sidewalk

in proper condition in that some defect existed in the pathway itself, or it appeared that the usually traveled part of the street was in proper condition, and that the injury had been occasioned by the traveler going outside of this part of the street. In this class of cases there is usually a choice given to the traveler to use the usually traveled and safe part of the highway or to go upon the part which may be less safe, and then it is for the jury to say whether it was negligence to use the latter. In this case, as the trial court stated to the jury, when the defendant in error started to cross the street there was nothing in the surroundings which would charge her with notice that she incurred greater danger in crossing diagonally, and therefore there was nothing on which to base the charge of contributory negligence other than the fact that she crossed diagonally, and certainly this would not sustain the charge of contributory negligence unless it be true that pedestrians have no right to cross a public street except at right angles, and at places ordinarily used as a crossing. The right to use the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised. *Elliott, Roads & S.* 622; *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. Rep. 415.

The only other error assigned which needs consideration is based upon that part of the charge upon the rule of damages which was given in the following words:

“ If she is under further disability, if these injuries are permanent in their character, so that she will not be able hereafter to resume her occupation, or, resuming it, cannot perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think that her powers are permanently impaired, that she will not hereafter be able to carry on her occupation as a school teacher, for the length of time for which she is withdrawn from her occupation she is entitled to such money as she could earn during that time, whether it be one year or more.”

In effect, the jury were instructed that defendant in error was entitled to compensation for the past loss of time, resulting from the injury, — that is, to the compensation she would have earned as a school teacher; and, further, that, if the jury found that the injuries received would impair her ability to carry on her occupation as a school teacher in the future, she would be entitled to the salary she would have earned for the year or years she was disabled from pursuing her occupation. In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule

is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters. *Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1; *Railway Co. v. Needham*, 10 U. S. App. 339, 351, 3 C. C. A. 129, 148, and 52 Fed. Rep. 371, 378. We are of the opinion that the charge of the court on this subject is open to the criticism that the jury would naturally infer therefrom that they must compensate the defendant in error for this future loss by allowing her the yearly compensation she had earned as a teacher for the length of time they deemed the disability would continue, thus assuming that, if this accident had not happened, the defendant in error would certainly have continued to teach at that rate of salary for her lifetime, or for the length of time the jury determined the injury would continue to affect her ability to earn money; and, as already said, this is not a correct statement of the rule to be observed by the jury in estimating damages of this nature.

For these reasons, the judgments rendered must be reversed, and the case be remanded for a new trial as to both the city of Denver and the electric company.

THAYER, Circuit Judge (dissenting). — I am not able to concur in all the propositions considered and decided in the foregoing opinion. If a city authorizes a telegraph, telephone, or electric light company to erect a tall wooden pole, burdened with wires, on one of its public thoroughfares, it is affected with knowledge, from the very nature of the structure, that, in course of time, it will decay, and become dangerous to those who have occasion to use its streets. I am of opinion, therefore, that a municipality which authorizes such poles to be erected on its streets is under an obligation to the public to see that they are examined in a proper manner and at reasonable

intervals, either by its own agents or by the persons or corporations whom it has authorized to erect them, and that the duty of inspection does not rest exclusively upon the latter, as the opinion of the majority seems to hold. Moreover, I do not understand that the charge of the trial judge, when considered altogether, imposed upon the electric light company the duty of exercising more than ordinary care in the matter of inspecting its poles. From the fact that the jury were instructed very pointedly that there could be no recovery against either of the defendants unless negligence on their part was proven, it is apparent, I think, that the trial judge did not entertain the view, or intend to convey the idea to the jury that the electric light company was bound at all hazards to see that its poles were in a safe condition. Considered as an entirety, the charge on this branch of the case meant, I think, that the electric light company was required to adopt a proper method of examining its poles, — one which would be liable to develop any interior rottenness, — and to examine them at reasonable intervals. This direction, in my judgment, was substantially correct.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. COGGINS.

Circuit Court of Appeals, United States, Sixth Circuit, July, 1898.

CARRIER AND PASSENGER — RELATION EXISTS WHEN PASSENGER HAS TEMPORARILY ALIGHTED. — Where a passenger, without objection by the company or its agents, alights at an intermediate station, a station for the reception and discharge of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger and is justified in the belief that the company is exercising due care for his safety (1).

SAME. — Plaintiff, an employee of a telegraph company, alighted from a train that stopped about 1,500 feet from the station, the usual place, and, according

1. As sustaining the proposition the court cited *Dodge v. Steamship Co.*, 148 Mass. 207, 3 Am. Neg. Cas. 843; *McKimble v. R. R. Co.*, 141 Mass. 463, 3 Am. Neg. Cas. 831; *Parsons v. R. R. Co.*, 113 N. Y. 362, 363; *Packet Co. v. True*, 88 Ill. 612, 2 Am. Neg. Cas. 617; *Dice v. Locks Co.*, 8 Oregon, 60, 6

Am. Neg. Cas. 202; *Railroad Co. v. Riley*, 39 Ind. 568; *Railroad Co. v. Shean*, 18 Colo. 368.

A contrary view is announced in *State v. Grand Trunk R. Co.*, 58 Me. 176; *De Kay v. Railway Co.*, 41 Minn. 178, 4 Am. Neg. Cas. 233.

to his evidence, he started to walk to the station to see if there was a telegram for him from his employer, and according to defendant's evidence he was merely loitering between the tracks. He was struck and injured by a car being switched upon a side track. The question whether he was entitled to the care due a passenger or only the care due to a stranger was properly left to the jury.

SAME — CARE TO BE EXERCISED WHILE PASSENGER GOING FROM TRAIN TO STATION. — When a passenger is proceeding in the usual way from a train to the station, he has the right to assume that the company will not expose him to danger without full warning; and, though this does not relieve him from the duty of exercising ordinary care in a yard where trains are moving about, it is for the jury to say whether it did not justify him in assuming that a train on a main track would not suddenly be switched across the only practicable path open to him to reach the station without some special warning (1).

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

WM. L. FRIERSON, for plaintiff in error.

CHAMPE S. ANDREWS, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

This is a writ of error to reverse the judgment for the plaintiff below in an action for damages for a personal injury inflicted in Georgia. The plaintiff, Coggins, was a lineman or telegraph repairer in the employ of the Western Union Telegraph Company. His wages were \$50 a month, and his expenses. He was furnished by his employer with an annual pass over the defendant's road. Upon what consideration this annual pass was issued by the railroad company to the telegraph company did not appear in the evidence. The contract was called for by plaintiff's counsel, and was not produced. The court charged the jury that the rights of Coggins were the same as if he had paid his fare, and this, though excepted to, is not assigned for error. The evidence for the plaintiff tended to show the following state of facts: Coggins was directed by his superior to take passage on this train, which was a freight train carrying passengers, for Crudup, where the telegraph line needed repair. At Rising Fawn, Ga., an intermediate station, the train stopped to do some switching. The caboose in which Coggins was riding stopped about 1,500 feet from the station. This was the usual place for passengers by freight trains to alight. The only practicable way of reaching the station from this point was to walk between the main track and the house or scale track, which lay parallel to the main track

1. For other actions bearing on this point see vols. 2-7, AM. NEG. CAS., and vols. 1-4, AM. NEG. REP., and the current numbers of AM. NEG. REP.

on the right. Coggins had inquired of the brakeman how long the train would remain at Rising Fawn, and, on being told that its stay would be half an hour in length, alighted from the caboose, and walked between the tracks towards the station, to inquire whether there were any telegraph messages to him from his superior. It was customary for his superior, when he was out on the line, to telegraph orders to points where his train was likely to stop. As Coggins walked towards the station, he saw part of the train upon which he had come backing towards him on the main track. As it approached, he concluded it would be safer to cross over near to the house or scale track, lying parallel. A cut-off or switch track crossing diagonally from the main track to the house track lay just in front of him, and at his side. He crossed this, towards the scale track. His left side was now towards the approaching train. As he stepped over the second rail of the cut-off track, he heard a brakeman on the ground back of him calling in a loud voice to another brakeman on the approaching train. To see the cause of the calling, he turned half round towards the right, just as he reached the end of the ties of the cut-off track. As he did so, the cars, which, instead of continuing on the main track, as he expected, had been switched on to the cut-off track, struck his right shoulder, whirled him about, and threw him on his back, with his left arm under the wheels. He was more or less familiar with the yard at Rising Fawn, and the brakeman engaged in switching the train had told him that they were about to switch a number of cars on to the furnace tracks, which lay to the east of the main track, and on the side opposite to the house or scale track. Hence he did not anticipate that the train, as it approached, would be switched over on the house track cut-off. Both the brakemen engaged in switching the train were where they could have seen Coggins had they looked; and one did see him, but was made so speechless at the sight of his danger as not to give him warning, and the other one, who was on the rear end of the backing train, did call, but not until it was too late for Coggins to escape. This is the case for the plaintiff.

The defendant introduced evidence to show that the accident occurred fifteen or twenty minutes after the train stopped at Rising Fawn; that Coggins was loitering along between the tracks, talking with acquaintances whom he met there; that he had no ground to anticipate the receipt of telegraphic orders at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. Counsel for the railroad company excepted to that part of the charge of the court in which, after explaining the high degree of care a railroad company owes to its passengers, the

court submitted to the jury as an issue of fact whether Coggins was to be regarded as a passenger when he was injured.

The points decided are stated in the syllabus.

Judgment affirmed.

Opinion by TAFT, Circuit Judge.

WEISS V. BETHLEHEM IRON COMPANY.

Circuit Court of Appeals, United States, Third Circuit, June, 1898.

MASTER AND SERVANT — EMPLOYEE RUN DOWN BY LOCOMOTIVE WHILE CROSSING PRIVATE RAILWAY TRACK. — The rule to stop, look and listen, regulating the conduct of a traveler upon a highway when about to cross a railroad track is not the criterion by which to determine the degree of care required of an employee in a rolling mill when about to cross a private railway of the mill. In such case the employer is bound not to expose its servant, conducting its business, to unnecessary peril against which it might have guarded with reasonable diligence; the servant has the right to assume that the employer will not subject him to needless danger and is bound only to observe reasonable care to avoid danger which is obvious or which was known to him or of which he might have acquired knowledge by the exercise of proper attention.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BRADFORD**, District Judge.

GEORGE DEMMING and **M. HAMPTON TODD**, for plaintiff in error.

JOHN G. JOHNSON (**FRANK P. PRICHARD** with him on the brief), for defendant in error.

This is an action brought by John Weiss against the Bethlehem Iron Company to recover damages for bodily injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The plaintiff went into the employment of the defendant company at its steel works on the evening of April 27, 1896. He worked at night from six o'clock in the evening to six o'clock in the morning, and his duties were to wheel fire brick and clay in a wheelbarrow to a place in the defendant's mill, where new furnaces were in course of erection, and to wheel therefrom old fire brick, and dump them at a refuse pile in the defendant's adjoining mold yard. While engaged in this latter work, shortly after nine o'clock on the night of April 30, 1896, — the fourth night of his employment, — the plaintiff was struck by a moving car which

crossed his pathway, and was badly maimed, under the circumstances and in the manner about to be related. In wheeling away the old fire brick in his barrow, the plaintiff pursued, as he was directed to do, a wheelbarrow runway which passed through an opening in the wall of the mill out into the mold yard, and proceeded through the yard to a right angle of the wall of the mill, and thence, turning to the left on a line parallel with the wall, and a few feet distant therefrom, to the refuse pile. The last-mentioned part of this wheelbarrow runway at one point crossed a narrow-gauge railway track, two and one-half feet wide, upon which ran a "dinkey engine" and its "buggies" (a small locomotive and small cars), used in transporting molds from and into the mill. In coming out of the mill into the mold yard, this dinkey engine and its cars emerged through a doorway in the wall, which doorway was eleven feet, less four inches, wide. The distance from the outside of the wall to the middle of the wheelbarrow runway crossing was seven feet. Immediately inside the doorway, within the mill, the railway track made a sharp curve, so that a person standing in the middle of the wheelbarrow crossing and looking into the mill through the doorway could see along the railway track only the distance of nineteen and one-half feet. Therefore, if the head of the engine were on the track inside the doorway, and twelve and one-half feet distant therefrom, it would be invisible to a person at the wheelbarrow crossing under all circumstances. The dinkey engine was nineteen feet long, and the length of one of its buggies or cars was eleven and one-half feet. In coming out of the mill through the doorway, the engine sometimes pulled a car, and sometimes pushed a car ahead. Its ordinary rate of speed was from four to six miles an hour. Its usual signal before it emerged outside was its whistle, sounded a short distance — about twenty-five feet — inside the mill as it came around the curve already mentioned towards the doorway. Usually, however, there were three dinkey engines in constant use in the mill at the same time, moving upon several narrow-gauge railway tracks laid in various directions through the mill; and these three engines, it was testified, were giving signal whistles every few minutes all day and all night. A disinterested witness (Julien), speaking of these moving dinkey engines, said: "They always whistle; they are always going, never stop." It also appeared that there were several stationary engines in the mill near this locomotive doorway, whose whistles were sounding from time to time, and that other loud noises at the place were constantly made by the Bessemer blowers and otherwise. The plaintiff was thirty-one years of age. He was a German, who had only been in this country a few months before he

went into the defendant's service. He had not previously worked in such an establishment, and had never been in the defendant's works before his hiring.

There was evidence tending to show that it was a rule at the defendant's works for the foreman to warn new men in regard to the danger from locomotives, but that no such warning was given to the plaintiff. The defendant's general foreman, Charles G. Barnes, who hired the plaintiff, testified: "As a rule, I generally caution the men about the tracks to be crossed, and the locomotive coming out on the tracks; but I don't know whether I told him (plaintiff) or not. I know I told the foreman of the bottom-makers to tell him about it; to take him out and show him the tracks." It was not shown that anyone had given such caution to the plaintiff. To the contrary, speaking of the dinkey engine which came out of the doorway into the mold yard and crossed the wheelbarrow runway, the plaintiff testified, "No one told me anything about that locomotive." The plaintiff testified that during each of the three nights he had worked before the night on which he was hurt he had wheeled six loads of old fire brick to the refuse pile, and, counting both his goings and returns, had thus crossed the railway track twelve times each of these three nights. He had wheeled, it seems, three loads on the fourth night before the trip on which the accident occurred. Thus, as he stated, he had crossed the track with his wheelbarrow altogether forty-two times, computing both his going and returning. The plaintiff testified that only on one occasion had he seen the locomotive come out of the doorway into the mold yard, and this on the first or second night of his service; and that on that occasion a man came to the doorway, looked out, and beckoned with his hand for the engine to come on, and that this man came out, and the engine followed him. No part of this testimony was contradicted. In one particular it was corroborated, as we shall more fully see hereafter.

On the occasion when the plaintiff was run down, the locomotive, it would seem, was moving at its usual speed, and blew its usual signal whistle inside the mill at the customary place, but no other precaution was observed. The engine was pushing a car ahead. The car was loaded with molds, which, it was testified, would show a "cherry red" in the dark. There was no light on the car, nor was any person on it. The engineer, speaking of the plaintiff, testified, "I couldn't see him; there were molds on the top of the buggy." Presumably, then, the plaintiff could not see the engineer or the head of the engine. In the mold yard there was an electric arc light perhaps 150 feet from the crossing. As to the effectiveness of this light at the place of the accident there was some conflict of evidence.

With reference to the accident the plaintiff testified in substance as follows: That as he approached near to the railway track, and before starting to cross it, he listened and looked, and he heard nothing and saw nothing; that he then went straight ahead, without stopping, and shoved his wheelbarrow over the track; that he himself had reached the middle of the railway track when he was struck by the car and dragged by it seven or eight yards. In response to the question asked by the court, "Why did you do that (listen and look) if you had never seen an engine pass along that track but once in all your experience?" the plaintiff answered, "I looked and listened, and when that man came out before to see whether everything was right, — that was the reason I looked and listened. I looked for the man to come." The plaintiff stated that while he was upon this trip and after he had started from the mill he heard the whistle of a locomotive inside, but that the locomotives were constantly whistling inside the mill as he passed along the wheelbarrow runway.

The counsel for the defendant insists "that as a matter of law the plaintiff upon the evidence in this case cannot recover;" but this proposition is wholly inadmissible. The Supreme Court of the United States has declared that "it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered one of law for the court;" (Grand Trunk R'y Co. *v.* Ives, 144 U. S. 408, 417; Texas and Pacific R'y Co. *v.* Gentry, 163 U. S. 353, 365, 368) and the court there made observations which we do well to bear in mind here: "What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs." As was said in Texas and Pacific R'y Co. *v.* Gentry, *supra*, so we say of the present case that it was "one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion."

The evidence, we think, fairly justified a finding that the crossing at which the plaintiff was injured was a place of special danger. As we have seen, the wheelbarrow runway crossed the railway track in front of, and only seven feet from, a comparatively narrow doorway out of which a dinkey engine and its cars emerged. A sharp

curvature of the railway track inside the doorway prevented a sight of an approaching locomotive or car until it was within twenty feet of the crossing. It was no unusual thing, as happened in the instance under investigation, for the engine to push ahead a car without lookout or light upon it. The only signal of approach usually given, and the one given on this occasion, was a whistle from the locomotive while it was inside the mill and not visible from the crossing. There was evidence tending to show that the defendant's superintendent and foreman regarded this crossing as particularly dangerous, and that the habit was to warn new and inexperienced employees against this danger. The plaintiff testified that no such warning was given to him, and in this statement he was thoroughly corroborated. Under the evidence a finding that he was so cautioned could not have been sustained. The plaintiff was entirely inexperienced when he entered the defendant's service. This was known to the defendant's foreman when the plaintiff worked at night. He was injured in the early part of the fourth night of his service. He testified that only once had he seen the locomotive come out through this doorway, and that then a man came before, apparently to give warning of its approach.

The points decided are stated in the syllabus.

Judgment reversed and cause remanded to Circuit Court with directions to set aside the verdict and grant a new trial.

Opinion by ACHESON, Circuit Judge.

PHILADELPHIA AND READING RAILWAY COMPANY v. YOUNG.

Circuit Court of Appeals, United States, Third Circuit, December, 1898.

PRACTICE — WAIVER OF EXCEPTION. — The introduction of evidence by the defendant after the denial of a motion for a nonsuit at the close of plaintiff's evidence is a waiver of an exception to the ruling.

ESCAPE OF SPARKS FROM LOCOMOTIVE — INJURY TO PERSON ON STATION PLATFORM. — Where it appeared that while the plaintiff was rightfully on a station platform of defendant's railroad, a train passed at a high rate of speed and a number of sparks escaping from the bottom of the locomotive were blown upon the platform and one of them struck the plaintiff in the eye, and destroyed the sight, and there was evidence that tended to show that the escape of sparks in that manner was not usual if the ashpan was in proper repair and the locomotive properly handled, the question of defendant's negligence was properly submitted to the jury, and a judgment for plaintiff was affirmed.

ERROR to Circuit Court of the United States for the District of New Jersey.

J. J. BERGEN, for plaintiff in error.

CHAUNCEY H. BEASLEY, for defendant in error.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BUTLER**, District Judge.

ACHESON, Circuit Judge. — Charles Young brought this suit against the Philadelphia and Reading Railway Company to recover damages for the loss of the sight of his left eye, alleged to have been occasioned by the negligence of the railway company. It appears that on the forenoon of October 11, 1897, the plaintiff took passage on one of the defendant's trains on a trip from Trenton to Philadelphia. The train stopped at Wayne Junction station, where it was necessary for the plaintiff to change trains. The plaintiff got out on the defendant's platform at this station to take the train which was to convey him to his destination. The plaintiff testified that while he was thus on the platform, awaiting his train, a through train of the defendant passed along on one of the tracks near the platform at a high rate of speed; that the furnace door of the locomotive was open and a man was shoveling coal into it; that he (the plaintiff) saw "a lot of sparks" falling from underneath the locomotive (where the ash pan was), "flying in all directions," "shooting all along the bottom there;" that the wind was blowing towards the station, and the red-hot cinders flew towards him, and four or five of them struck his face and clothing, one of them striking right in his eye. He stated that the cinder that struck his eye "must have been a pretty good-sized one," because when he "wiped the eye the handkerchief was full of pieces of cinders;" that there were "small pieces of coal and blood on it." Notwithstanding medical treatment, obtained with reasonable promptitude, the injury to the plaintiff's eye resulted in the total loss of its sight.

At the close of the plaintiff's evidence in chief the defendant's counsel moved the court for a judgment of nonsuit on the ground of alleged lack of proof of negligence. This motion was refused, and its denial is now assigned as error. But the defendant waived exception to this ruling by its subsequent introduction of evidence in defense. *Telegraph Co. v. Thorn*, 28 U. S. App. 123, 12 C. C. A. 104, and 64 Fed. Rep. 287; *Railroad Co. v. Mares*, 123 U. S. 710, 713, 8 Sup. Ct. Rep. 321. The defendant, however, after all the evidence was in, asked for peremptory instructions in its favor, which the court declined to give; and the assignment of error to this refusal presents the principal question in the case, namely, the sufficiency of evidence legitimately tending to show that the injury

to the plaintiff's eye was caused by some negligence chargeable to the defendant.

The plaintiff was lawfully on the defendant's platform at Wayne Junction station. Indeed, as he was there for the purpose of making a change of trains, perhaps he might be regarded as having been, at the time of the accident, constructively in the defendant's care as a passenger. At any rate, the defendant owed to the plaintiff the duty of at least reasonable and ordinary protection against the peril of live cinders issuing from its locomotives running past the station in near proximity to the platform. We agree to the proposition that the defendant is not liable to the plaintiff for damages necessarily caused by the careful and skilful exercise of its lawful rights, and, undoubtedly, the burden was on the plaintiff to prove negligence on the part of the defendant occasioning the injury complained of. Negligence, however, may be established by circumstantial evidence, and proof of the occurrence of an accident which ordinarily would not have happened if due care had been exercised may justify an inference of negligence. This accident occurred in the daytime, yet, upon the plaintiff's account of the matter, the sparks were plainly visible. It is, then, a rational supposition that the sparks were of large size. Certainly this seems to have been the character of the live cinder which struck and destroyed the plaintiff's eye. Moreover, according to the plaintiff's testimony, the sparks fell from underneath the locomotive in great numbers. Now, the evidence warrants the belief that a properly constructed and carefully managed ash pan would have prevented such an emission of sparks, and, indeed, any considerable fall of sparks. Upon the theory of proper care and absence of fault, the accident here is unaccountable. One of the defendant's witnesses, a locomotive fireman, testified that if he saw a spark coming from the ash pan he "would think something must be wrong." Other witnesses gave testimony of the like import. The evidence as a whole, we think, was amply sufficient to carry the case to the jury. *Huyett v. Railroad Co.*, 23 Pa. St. 373; *Railroad Co. v. McKeen*, 90 Pa. St. 122. Although the defendant introduced testimony to show that the appliances upon its locomotive for preventing the emission of sparks were of the best known kind, and that they were in good order, and carefully handled, still, under the entire evidence, and in view of all the circumstances, the question of negligence was not one of law for the determination of the court, but was a question of fact to be submitted to the jury.

The parts of the court's charge embraced in the fourth and fifth assignments seem to us to be free from error. Those instructions

on the whole were very favorable to the defendant. Under the charge there could be no verdict for the plaintiff unless the jury found the defendant to have been guilty of negligence. The judge said: "It must be shown that the defendants have been guilty of some negligence; that they have failed in some duty to this plaintiff, — either they have not used proper appliances, or, if they have used proper appliances, they have not used them with reasonable care." Several experienced witnesses had testified, in substance, that the emission of sparks would indicate that something was wrong with the ash pan, and the court was justified in submitting to the jury the question whether proper appliances had been used.

We do not perceive that any error was committed in allowing this question and answer: "Q. Is there any general custom, that you know of, with regard to firing or not firing an engine as it passes a railroad station? A. Well, it is generally the rule not to fire at stations." The witness had been a railroad engineer. He stated the reason for the general rule, namely, the danger of sparks flying from the smokestack and ash pan during the operation of firing. The evidence related to general usage, and bore on the question of the exercise by the defendant of ordinary care (1).

The judgment of the Circuit Court is affirmed.

1. For actions relating to DAMAGES TO PROPERTY CAUSED BY SPARKS FROM LOCOMOTIVES, see the several cases on the subject in vols. 1-5, AM. NEG. REP., and the current numbers of that series of Reports.

See NOTE OF CASES RELATING TO DAMAGES TO PROPERTY CAUSED BY

EMISSION OF SPARKS FROM LOCOMOTIVES AND RAILROAD FIRES, in 3 AM. NEG. REP. 705-709.

See also NOTES OF CASES AS TO FIRES CAUSED BY EMISSION OF SPARKS FROM LOCOMOTIVES, in 4 AM. NEG. REP. 278-297.

ILLINOIS STEEL COMPANY v. BAUMAN.

Supreme Court, Illinois, February, 1899.

MASTER AND SERVANT — RISK OF EMPLOYMENT. — Although a servant assumed the danger arising from explosions, when molds were uncapped, from the unavoidable escape of small quantities of slag from the ladles into the molds, it cannot be said that an explosion occasioned by the intentional act of a pourer in purposely permitting slag to pass into the molds in a quantity known to be dangerous was, as matter of law, one of the assumed risks of his employment.

FELLOW SERVANTS. — Whether the plaintiff and the employee who was the cause of the injury were fellow servants was properly left to the jury where it appeared that they were both employed by the same master but worked in different departments under different foremen and were not stationed in the same building or within sight or hearing of each other and their usual duties did not bring them into even temporary association.

APPEAL from judgment, Appellate Court, Second District (78 Ill. App. 73), affirming a judgment for plaintiff.

GARNSEY & KNOX and WM. DUFF HAYNIE, for appellant.

JOHN W. D'ARCY, for appellee.

BOGGS, J. — The appellee obtained a judgment against the appellant company in the Circuit Court of Will county in an action on the case for damages sustained by reason of personal injuries received while in the employ of the company. This is an appeal from a judgment of the appellate court for the Second district affirming that of the Circuit Court.

The sufficiency of the declaration was not challenged by demurrer, but the plea of not guilty was interposed. At the close of the evidence for the appellee, the appellant moved the court to exclude the evidence, and to instruct the jury impaneled to try the issues in the case to return a verdict that it was not guilty. The court denied the motion, and the company saved exceptions. The cause was then submitted to the jury upon the evidence produced in behalf of appellee. But one instruction was given, and that at the instance of the appellee. It defined the relation of fellow servant, and it is not urged the definition given is in any wise objectionable. No complaint is made of the rulings of the court as to the admissibility of evidence. The record, therefore, presents but a single question, — whether the Circuit Court erred in overruling the motion of appellant to exclude the testimony and peremptorily direct a verdict in its favor.

It appeared in the testimony the appellant company, at the time appellee was injured, was engaged in manufacturing steel from iron ore, and maintained a large plant at Joliet, comprising a number of buildings and structures. One of the buildings was known as the "converting room" or "mill." In the converting room of this mill were two large vessels, in which melted iron was converted into steel by the Bessemer process. After the process of conversion has been completed, the product, in molten condition, is drawn from the vessels into a large receptacle termed a "ladle," from which it is drawn, through an opening in the bottom of the ladle, into iron molds. The capacity of the ladle is equal to that of six of the molds. These molds, in groups of six in number, are brought into the converting room upon cars, and made to pass under the ladle. The ladle is provided with a tube in the bottom thereof, to allow the melted metal to run from it into the molds. The tube is opened and closed by means of a lever, operated by an employee called a "pourer." A substance called "slag" is always present in the metal in the ladle. It is lighter than the metal, and most usually rises to the top. If slag is permitted to enter the molds, it is likely to cause an explosion when the molds are cooled for the purpose of removing their contents. It is the duty of the pourer to so manipulate the lever as to stop the flow from the ladle the moment he sees, from its color, that slag is beginning to enter the molds. The admission of slag into a mold in a quantity equal to the depth of one-half an inch within the mold would likely cause an explosion when the mold is cooled and uncapped. It is the duty of the pourer to exercise care to prevent slag from entering the molds, but it is apparent that exercise of ordinary care in this regard will not always avail to wholly prevent the escape of slag from the ladle into the molds. The slag, being usually at the top of the metal within the ladle, will not make its appearance until the contents of the ladle are well-nigh exhausted, and its presence is therefore to be expected when the last one of the six molds is being filled. As soon as the slag commences to pass from the ladle, it is the duty of the pourer to shut it off from the molds, and to cause it to be emptied from the ladle into a receptacle called a "butt," which is provided for the purpose of receiving and holding it. When the contents of the ladle proper to be received in the molds has been emptied therein, the molds are closed by a covering, called a "cap," and the cars upon which they are loaded are moved out of the converting room upon a track which leads to another building, where the contents of the molds, after they have cooled and hardened, are removed from the molds by a process called "stripping." The product is then called

"ingots" or "billets" of steel. After passing out of the converting mill, but before reaching the department of appellant's plant where the molds are stripped from the billets, the cars containing the molds are stopped at a platform erected beside the track, for the purpose of preparing the ingots or billets for the final process of stripping the molds from them. This is accomplished by chilling the molds with water from a hose, and removing the caps. On the occasion when the appellee was injured, he was stationed on that platform, and engaged, as an employee of the appellant company, in throwing water from the hose upon the molds, and removing the caps therefrom. One James Bartley was, on the same occasion, employed as pourer of the metal from the ladle to the molds in the converting room. It appeared that, though Bartley knew that if slag was allowed to pass into the mold, even in such small quantity as one-half of one inch in thickness, it would almost inevitably cause the mold to explode when uncapped, he purposely allowed a slag to flow from the ladle into the last or sixth of a group of molds in such quantity that it filled said mold to the extent of one foot in thickness of the slag. It further appeared that, when that mold was stopped at the platform where the appellee was stationed, it fell to the appellee to chill and uncapp the same, and in so doing the mold exploded with great force and violence, whereby a large quantity of the molten metal was thrown upon the head, shoulders, arms, and other parts of the person of the appellee, severely burning and injuring him.

It is urged by the appellant company that explosions of the molds constitute one of the usual and ordinary perils of the employment of those engaged in the work of cooling and uncapping the molds, and are therefore assumed by one accepting such employment; and, further, that the pourer bore the relation of fellow-servant to one so engaged; and for these reasons it is urged the court should have excluded the evidence from the jury and directed a peremptory verdict of not guilty. It appeared from the evidence that, notwithstanding the exercise of ordinary care by the pourer to prevent the passage of slag into the molds, some slag would at times find its way from the ladle into a mold, and that explosions would at times probably occur. It was not, however, reasonably to be apprehended that the pourer would fail to detect the presence of any considerable quantity of slag, and that therefore explosions would but infrequently occur, if at all, and would, in any event, be but slight in character, and not likely to be followed by any serious results. "An employee does not assume all the risks of a service in which he may be engaged, but he assumes only ordinary, obvious, or known

risks." Wood, Mast. & S. 385. The servant assumes only such risks as are incident to his employment, or as are usual or ordinary, and which remain so incident after the master has taken reasonable care to prevent them. Railroad Co. *v.* House, 172 Ill. 601, 50 N.E. Rep. 151. A servant assumes risks of known dangers, — such as are so obvious that knowledge of their existence may be fairly presumed; but the law does not imply that he has any notice of dangers not obvious to the senses, and arising out of extraordinary circumstances. Bridge Co. *v.* Walker, 170 Ill. 550, 48 N. E. Rep. 915. Appellee, it may be conceded, assumed all of the ordinary, obvious, or known risks of the service in which he was engaged. The danger arising from explosions which were liable to happen from the unavoidable escape of small quantities of slag from the ladle into the molds it may also be conceded was one of the ordinary and known risks, and, as such, was assumed; but it cannot be said that an explosion occasioned by the intentional act of a pourer, in purposely permitting slag to pass into the molds in a quantity known to be dangerous, is, as a matter of law, one of the ordinary, usual, and known risks of his employment. Whether it is so is a question of fact, not of law. The evidence justified the submission of the question to the jury as a question of fact.

The court having correctly defined to the jury the relation of fellow servant, it only remains to determine whether the evidence justified the submission of that question to the jury as a question of fact. Appellee and the pourer, Bartley, were employees of the same master, and were engaged in the promotion of the general enterprise of the master. But we recognize the rule that, if the business of the employer is divided into separate departments, a laborer in one department is not necessarily a fellow-servant with a laborer in another and separate department, though both are servants of the same master. In order that workmen be fellow servants within the rule which obtains in this State, it is not sufficient they are serving the same master, but it is essential they shall, at the time of the injury complained of, be actually co-operating with each other in the particular business in hand, in the same line of employment, or that their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. This has been declared so often by this court to be the rule it is unnecessary any of the numerous decisions should be cited. The evidence tended to show that Bartley was employed in one department of appellant's plant, denominated the "converting room" or "mill," which was devoted to a particular branch of its business, — *i. e.*, converting iron into steel. The process of

conversion left the steel in a molten condition in the molds hereinbefore mentioned. It maintained another department of its business, which was devoted to the work of removing the steel from the molds, called "stripping" the molds. The evidence further tended to show the first step in the process of stripping was performed by appellee. The converting mill and the employees therein were under the control of a superintendent, and the appellee was subject to the control of another and different principal servant, called the "yard foreman." The further tendencies of the evidence were that the pourer and the appellee were not stationed in the same building, or within sight or hearing of each other, and that the usual duties of their respective employments did not bring them into habitual or even temporary association. In this state of the proof, whether the appellee and the pourer were directly co-operating in a particular business in the same line of employment, or whether their usual duties brought them into habitual consociation so that they might exercise an influence, each upon the other, promotive of proper caution, was a question of fact for the jury.

The errors assigned are not well taken, and the judgment must be, and is, affirmed.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. ROUSE.

Supreme Court, Illinois, February, 1899.

MASTER AND SERVANT—CONFLICT OF LAWS—ACTION FOR INJURY FROM NEGLIGENCE OF FELLOW SERVANT, IN STATE THAT HAD NO STATUTE GIVING RIGHT OF ACTION. — A right of action for an injury caused by the negligence of a fellow servant in a state where the master is made liable by statute will be enforced in a sister state wherein there is no such statutory law; the doctrine of *respondent superior* as enlarged in the former state not being so repugnant to good morals or natural justice, or so prejudicial to the best interests of the people as to warrant a declaration that the suit could not be maintained.

APPEAL from judgment of Appellate Court, Third District (78 Ill. App. 286), affirming a judgment for plaintiff.

WILL H. LYFORD, H. M. STEELY, and ALBERT M. CROSS, for appellant.

TILTON & CUNDIFF, for appellee.

BOGGS, J. — George W. Brewer, deceased, appellee's intestate, during his lifetime and at the time of his death, was a resident of Vermilion county, in this State. The appellant, a corporation organized

under the laws of the State, was engaged in operating its trains over its own lines and leased lines of railway in the States of Illinois and Indiana. Said intestate was employed as a fireman on one of appellant's locomotive engines, and, while engaged in the discharge of his duty in that capacity on an engine drawing a passenger train along the line of appellant's road in the State of Indiana, was killed by a collision between the said engine and train upon which he was employed, and another engine, drawing a freight train, controlled and operated by other servants of the appellant company upon its said line of road in the State of Indiana. This was an action on the case, commenced in the Circuit Court of Vermilion county, Ill., by the appellee, administrator of the said Brewer, to recover damages for the benefit of those entitled to receive distribution of the personal effects of the said deceased.

The declaration, in some of the counts, charged that the collision was occasioned by the negligence of the conductor of the freight train, and, in other counts, that the trains collided because of the negligence of the engineer of the freight train, and counted and predicated the right of recovery upon an alleged liability created by the statute of the State of Indiana in such cases, and set forth the statute of such State, and such statute was produced in evidence. Section 7083 of the Indiana statute (Burns' Rev. St. 1894, sec. 7083) provides that where the death of an employee of any railroad company or other corporation is caused by the negligence of any person in the employ or service of such corporation who has charge of any locomotive engine or train of cars upon any railroad, or by the negligence of any fellow servant engaged in the same common service in any of the several departments of such corporation, while the employee so killed is obeying or conforming to the orders of some superior having authority to direct at the time of such death, the railway company or other corporation operating such locomotive engine or train shall be liable to respond to the personal representatives of such deceased in damages in a sum not exceeding \$10,000, to be distributed to the widow and children, if any, or next of kin, of the deceased, in the same manner as personal property of the deceased. A plea of not guilty was filed, and the cause submitted to and heard by a jury, who returned a verdict in favor of the appellee administrator in the sum of \$5,000. The judgment was affirmed by the judgment of the appellate court for the Third district on appeal, and the appellant company has prosecuted a further appeal to this court.

The effect of the statute of Indiana is to abrogate the doctrine which, it seems to be conceded, would otherwise be applicable to

the facts of this case, — that the appellant company, as employer, is not to be held liable for an injury, fatal or otherwise, to an employee, which was occasioned by the negligence of a fellow servant of such employee. The principal question arising is whether this statute will be applied and the doctrine thereof enforced in an action instituted and maintained in the courts of this State, or whether the law as it exists in this State will govern and control. Actions not penal, but for pecuniary damages for torts or civil injuries to the person or property, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister State of the Union will be enforced by the courts of another State of the Union, unless against good morals, natural justice, or the general interest of the citizens of the State in which the action is brought. Dicey Confl. Laws, pp. 667–669, par. 1; *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. Rep. 413; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 29; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978; *Higgins v. Railroad Co.*, 155 Mass. 176, 29 N. E. Rep. 534; *Walsh v. Railroad Co.*, 160 Mass. 571, 36 N. E. Rep. 584; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. Rep. 230; *Morris v. Railway Co.*, 65 Iowa, 727, 23 N. W. Rep. 143; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. Rep. 603; *McLeod v. Railroad Co.*, 58 Vt. 726, 6 Atl. Rep. 648.

It is argued by counsel for appellant that an action cannot be maintained in this cause in our courts, for the reason, as alleged, that the laws of the two States are materially variant, it being, as counsel insist, against natural justice and the established public policy of this State to hold an employer liable for injuries inflicted upon an employee by a fellow servant. This position finds support in the opinion rendered by the Supreme Court of Wisconsin in *Anderson v. Railway Co.*, 37 Wis. 321, and also in expressions employed in opinions rendered in cases in the courts of England. But such is not the prevailing doctrine in the courts of this country. The Supreme Court of the State of Minnesota, having before it the precise point in the case of *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. Rep. 413, gave forcible and clear expression of that which we conceive to be the correct doctrine. In that case the injury was inflicted in the State of Iowa, and was actionable under a statute of that State making railroad corporations liable for damages

sustained by an employee in consequence of the negligence of a fellow servant. The rule of nonliability for injuries caused by a fellow servant obtained in Minnesota, where the action was brought. The court said: "The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*. The defendant admits the general rule to be as thus stated, but contends that, as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers, notably Rorer on Interstate Law, seem to lay down this rule, but the authorities cited generally fail to sustain it. * * * But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the law of the State where made. To justify a court in refusing to enforce a right of action which accrued under the laws of another State because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa seems fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." The same question engaged the attention of the Supreme Court of the State of Massachusetts, in *Walsh v. Railroad Co.*, 160 Mass. 571, 36 N. E. Rep. 584, and it was said: "If, however, we assume, as was ruled and as we do assume, that, if the accident had happened in this State, the plaintiff could not have recovered, it is argued he cannot recover now. As between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance

of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." In *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978, the observations of the Supreme Court of the State of Minnesota in *Herrick v. Railway Co.*, *supra*, were quoted with approval, and the principles of that case applied. And in *Railroad Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. Rep. 934, it was ruled the responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose. In *Railway Co. v. Lewis*, *supra*, the suit was brought in Tennessee to recover damages for injuries received by an employee in the State of Georgia. The trial court charged the jury the plaintiff could recover, though guilty of contributory negligence. Such was the law of Tennessee, the place of the forum. The rule in the State of Georgia, the place where the injury was received, precluded recovery if the neglect of the person injured contributed to his injury. The court held the law of the State of Georgia controlled, and that the rule in the State of Tennessee, where the case was being tried, was not applicable to the case. The Supreme Court of the State of Indiana has declared the statute in question to be constitutional and valid. *Railway Co. v. Montgomery*, 49 N. E. Rep. 582. The right of action accrued and became complete in that State. In this State the doctrine of *respondeat superior* does not apply to a case where an employee is injured or killed by the neglect of a fellow servant, but the doctrine of *respondeat superior* is, in general, recognized in the jurisprudence of this State, and we perceive no ground warranting us to declare the enforcement of the doctrine as enlarged or extended by the Indiana statute must be regarded as so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people, that we should shut the doors of our courts against a suitor who seeks to enforce a right of action which arose under the statute of the sister State.

What has been said disposes of all objections to the action of the court in giving, refusing, and modifying instructions to the jury, except the complaint as to one instruction given for the appellee, relative to the liability of the company in the event they should find the trains collided because of the negligence of the conductor of the freight train. The criticism made upon this instruction is that there was no evidence to support it. We think the objection is not well grounded. The testimony of the engineer of the freight train, which was proceeding northward, tended to show he was induced to refrain from putting the train upon the side track at the stations of Atherton

and Lyford by a remark, in the nature of directions, made to him by the conductor at Otter Creek Junction. It further appeared that the conductor was riding in the cab of the engine of the freight train when that train ran past the side tracks at Atherton and Lyford. The trains collided 500 feet north of Lyford. The freight train should have been placed on the side track at Atherton or at Lyford, and this the conductor knew, or would have known had he kept his orders in mind, and noted the fact that his train was moving on the time of the passenger train which was coming south.

No other errors are assigned, and the judgment of the appellate court is affirmed.

WABASH RAILROAD COMPANY v. KINGSLEY.

Supreme Court, Illinois, February, 1899.

TRESPASSER ON TRAIN — EJECTION — WILFUL ACTS OF SERVANTS — CHARGE. — A charge that defendant company was liable for injuries to a trespasser put off a train, if defendants' servants failed to exercise due care was erroneous, as the company was only liable for injuries sustained from the wanton or wilful acts of its servants (1).

SAME — INSTRUCTION. — Where the declaration did not charge negligence but that plaintiff's injury was caused by the wilful and wanton acts of defendant's servants, an instruction, that if the jury believed the defendant was guilty of the negligence charged in the declaration they should find for the plaintiff, was error.

APPEAL from judgment, Appellate Court, Third District (78 Ill. App. 236), affirming a judgment for plaintiff.

This was an action brought by Alexander Kingsley against the Wabash Railroad Company to recover for an injury received from being put off a freight train running on the defendant's road. The declaration contained two counts. In the first count it is averred that, plaintiff being on a certain car of a freight train on defendant's road, the conductor of said train came to the plaintiff, and ordered him to alight therefrom; that plaintiff told said conductor that he could not obey said command on account of the speed of the train, and that the plaintiff then and there offered to pay his fare to said

1. For actions relating to EJECTION OF PASSENGERS FROM TRAINS, ETC., from the earliest period to 1896, see vol. 8 AM. NEG. CAS. where the cases are chronologically grouped and arranged in alphabetical order of states. For subsequent actions see vols. 1-5 AM. NEG. REP., and the current numbers of that series of Reports.

conductor; that the said conductor, in a willful and wanton manner, used threatening language towards and against the plaintiff, and then and there made an attack on the person of the plaintiff, and with force and violence then and there attempted to throw and force plaintiff from said car and train, whereupon, in fear of his life if he were so thrown, and to escape being thrown, he stated to said conductor that, if he (said conductor) would not throw and force said plaintiff from said train, he (the plaintiff) would get off of said train; and plaintiff avers that he did so get off said train while it was running in the rapid manner aforesaid, by reason of the threats and intimidations of said conductor, and to avoid being thrown off as aforesaid, and for no other reason or cause whatever; that, in so getting off, plaintiff used ordinary care for his own safety, but was thrown with great force and violence upon the ground, and received great, serious, and permanent injuries, etc. The second count is substantially like the first. To the declaration the defendant pleaded the general issue, and on a trial before a jury the plaintiff obtained a verdict and judgment for \$700, which, on appeal, was affirmed in the appellate court. The appellate court granted a certificate of importance, and allowed an appeal to this court.

GEO. B. BURNETT, for appellant.

JOHN STAPLETON, for appellee.

CRAIG, J. (after stating the facts). — It appears from the record that while a freight train of appellant, running from Springfield to Decatur, was stopped at the Illinois Central Railroad crossing, about three miles east of Springfield, appellee and two other persons who were with him boarded a flat car, and took seats behind an oil tank on the car. This train made no regular stops between Springfield and Decatur, and carried no passengers. The conductor of the train, who was standing on the top of a box car, saw appellee and his companion get on the train, and walked down where they were, and ordered them to get off. The testimony of appellee and his two companions was, in substance, that "they were put off the train, by force and intimidation," while it was running at a high rate of speed, while the evidence of the conductor and other trainmen was that the train was a heavy train, had just started, and was running slow, and that no force or intimidation whatever was used. The declaration charged "that the injury to appellee was willfully inflicted," and his evidence tended to support that averment; while the testimony on behalf of appellant as to what occurred at the time, and as to the speed of the train, tended to prove "that what was done by appellant's servants, at most, could not be deemed to be anything more than negligence."

Under the facts as disclosed by the evidence, in order to enable the jury to arrive at a correct result, it was necessary that the instructions should be accurate. At the request of the plaintiff, the court gave to the jury four instructions, three of which — the first, second, and fourth — are claimed to be erroneous. They are as follows: 1. "The court instructs you that even if you do believe, from the evidence, that the plaintiff had no right on that train, and the conductor, in discharge of his duty as manager of the train, undertook to put him off, the law requires the conductor to act in a prudent manner, — to exercise due care for the safety of the plaintiff; and if he failed to do so, and in consequence the plaintiff was injured, the defendant is liable." 2. "The court instructs the jury that if you believe, from the evidence, that the defendant is guilty of the negligence charged in the declaration, and that the plaintiff, while in the exercise of ordinary care for his personal safety, was injured as alleged in the declaration, then you should find the defendant guilty, and assess plaintiff's damages at whatever you may believe, from the evidence, the plaintiff has sustained." 4. "The court instructs the jury that if you believe, from the evidence, that the defendant is guilty of the negligence charged in the declaration, and that the plaintiff was injured as in the declaration alleged, and that the plaintiff, at the time of the injury, was in the exercise of ordinary care for his own personal safety, then you should find for the plaintiff."

In regard to the first instruction, upon an examination of the declaration and the evidence, it will be found that there is no claim in either that appellee was a passenger upon the train. The rights of the parties are therefore to be determined upon the fact conceded that appellee was wrongfully on appellant's train when expelled, — that he was a trespasser. As a general rule, a railroad company owes no duty to people, who trespass upon its cars, except, of course, its servants have no right to wantonly or willfully injure them. 3 Elliott, R. R. sec. 1255; *Railway Co. v. Brooks*, 81 Ill. 245; *Railroad Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. Rep. 812. In the case last cited, the duties of a railroad company to its passengers, and to persons who are trespassers on its trains, are considered. It is there said (page 64, 131 Ill., and page 812, 22 N. E. Rep.): "A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers. His duty to the latter involves the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy;

but, as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly and carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle. Schouler, Bailm. & Carr. sec. 620. In *Railway Co. v. Beggs*, 85 Ill. 80, we held that a person fraudulently riding on a free pass issued to another, and not transferable, was not a passenger, and that the railroad company would only be held liable for gross negligence which would amount to willful injury." In the case cited, an instruction was given in behalf of the plaintiff, as follows: "If the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, and without negligence on his part, was injured by negligence of the defendant, as alleged in the declaration, then the jury should find the defendant guilty, and assess the plaintiff's damages." This instruction the court held to be erroneous, upon the ground that it required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render a carrier liable only in case of injury to a passenger. Under the rule announced, it is manifest that the first instruction was erroneous. Here the declaration is predicated upon the ground that plaintiff was a trespasser, and that his injury resulted from the wanton and willful act of the servants of the railroad company; and yet, under the instruction, if the servants of appellant failed to exercise due care, the jury were informed that the plaintiff could recover. The plaintiff being a trespasser on the appellant's train, he could not recover unless the act resulting in his expulsion from the train by the servants of appellant was wanton or willful; but the instruction tells the jury that a recovery may be had if the servants of appellant failed to exercise due care for the safety of the plaintiff. The obligation imposed by the instruction was one which the appellant owed alone to a passenger, and the court erred in informing the jury that the railroad company owed the same duty to one who was a trespasser on the train.

In regard to the second and fourth instructions, it will be seen upon examination that they authorize a verdict for the plaintiff if the jury believe, from the evidence, that defendant is guilty of the negligence charged in the declaration. The declaration did not contain a charge of negligence. The act charged upon which a recovery was asked was willful and wanton, and under the rule laid down in *Railroad Co. v. Dickson*, 88 Ill. 431, no recovery could be had, under the declaration, for mere negligence. In that case the

wrong charged in the second count of the declaration was that the servants of the defendant caused the whistle to be sounded in sharp, shrill, loud sounds, "needlessly and recklessly, willfully, wantonly, and maliciously." In considering the right of recovery under that count the court said (page 435): "Under the second count the plaintiff could not recover upon proof of mere negligence on the part of defendant. No recovery could be had under that count without proof that the sounding of the whistle in the manner charged was done needlessly, and either wantonly, recklessly, willfully, or maliciously." We think these instruction were calculated to mislead the jury.

For the error, therefore, in giving the three instructions mentioned, the judgments of the Appellate and Circuit Courts will be reversed, and the cause will be remanded.

MEYER V. ILLINOIS CENTRAL RAILROAD COMPANY.

Supreme Court, Illinois, February, 1899.

MASTER AND SERVANT — FELLOW SERVANTS — CONDUCTOR AND FIREMAN OF TRAIN — COLLISION. — A conductor of a train is the fellow servant of the fireman and not a vice-principal of the company, and the latter is not liable for an injury to the fireman who jumped from a train as it collided head on with another train caused by the neglect of the conductor to have the brakes set in time to stop the train at the station where the other train was to be met, there being no evidence that the conductor had any more power than any ordinary conductor.

APPEAL from judgment of Appellate Court (65 Ill. App. 531), reversing judgment for plaintiff.

C. B. MORRISON and DIXON & BETHEA, for appellant.

WM. BARGE and E. E. WINGERT, for appellee.

PHILLIPS, J. — This was an action on the case by appellant against appellee to recover for damages arising from an injury received by reason of a train on which he was firing coming in collision with a train running in an opposite direction on appellee's road, causing appellant, to save himself, to jump from his engine and injure himself. His left foot and leg were run over by the cars and crushed, so that amputation became necessary. The accident occurred at or near the station of Lead Switch, in Jo Daviess county, Ill. The first count in the declaration, and the only one on which appellant claimed the right of recovery, sought to recover on the theory and

charge that the conductor of the train, George McDuff, was the superior servant in charge of the appellant as fireman, and had charge of the running of the train, and entire control and management of it; that he was representing appellee as vice principal in the running of the train; and that the accident was due to his negligence in not causing the train which he was running, and of which appellant was fireman, to stop, and not to run past Lead Switch station, where he was ordered by the train dispatcher to meet wild east-bound train No. 508. The train McDuff was running was No. 18, and was west-bound. It is insisted by the appellant that the failure of the conductor, McDuff, to cause the brakes to be set in time to stop his train at Lead Switch, and prevent collision with the train he was ordered to meet there, was such negligence as rendered appellee liable for the injury done to appellant by reason of the collision. The declaration further avers that the conductor had control of the fireman, as well as of all other employees of his train, and had a right to report a disobedience of his orders to the company and have them discharged, if the company would discharge them for disobedience. The act of negligence alleged against McDuff was that of omission, and not of commission. The case was tried by a jury, and resulted in a verdict for appellant for \$9,000. A remittitur of \$3,000 was entered, and a judgment on the verdict for \$6,000 in favor of the appellant resulted. The defendant appealed to the appellate court for the Second district, where the judgment was reversed; and, as appears by the record, the court found "that the conductor, McDuff, mentioned in the declaration and evidence, was the fellow servant of the appellee, both having the same common master, to wit, appellant (the Illinois Central Railroad Company), unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not."

There is no evidence tending to show that McDuff, as conductor, had any power, more than any ordinary conductor. He had no special supervision over other employees more than ordinary conductors. He was running the train from point to point and station to station under scheduled time, and under orders, telegraphic or otherwise, of a train dispatcher, which he had no right to disobey, or command other employees to disobey. His power was limited. He had no right to employ either the engineer or fireman, or discharge either for any cause. He could report any dereliction of duty to headquarters, or to the superior officers of the road. So could any other employee report any other. Rule 41 of appellee reads as follows: "No train will leave a station without a signal from

its conductor, nor before its time as specified in the time-table, without a direct and explicit order from the train master. Trains must be run under the directions of its conductor, except when his directions conflict with these rules or involve risk and hazard, in which case the engineer will be held equally responsible." It seems from this rule that he had partial control over the train and the train crew, but could not act contrary to the company's rules, or where his action involved risk or hazard, in which case the engineer was equally responsible. He had not the management of the train, — the full control, — as the principal officers of the company would have had, or that the train dispatcher had; and the engineer had a veto in case of risk, and must judge of when there was risk, as a matter of course. It may be admitted that it was the duty of the conductor to run the train inside the rules, and to so run it as to avoid injury to it and to everyone connected with it and to the public; and the evidence tended to show that, while he was aware that he was to meet the other train at Lead Switch, he failed to keep his train under control, so as to stop at that station or avoid injury; but, under the circumstances, can he be regarded as the vice principal of appellee, so as to make it responsible for his negligent act, irrespective as to whether he was the fellow servant of appellant? If the conductor was not the vice principal of appellee in regard to the negligence charged, and which the evidence tends to prove, he was clearly the fellow servant of appellant. There is no dispute in this case, or claim by appellant, that the accident of the collision occurred in any other way than by the failure of the conductor to set the brakes himself, or to order the brakeman to do so, in time to stop the train at Lead Switch. The accident did not occur on account of the conductor's exercise of any authority over the appellant which appellant, by virtue of his inferior position, was bound to obey under penalty of discharge; but the accident resulting from the negligence, if any, was one that might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman. The negligence was, then, that of a fellow servant, done in the performance of a fellow servant's duty, so far as the evidence shows. The fact that one of the number of servants is invested with power to control and direct the action of others will not, of itself, render the master liable for the negligence of the governing servant. *Railroad Co. v. May*, 108 Ill. 288; *Railway Co. v. Hawk*, 121 Ill. 259, 12 N. E. Rep. 253; *Gall v. Beckstein*, 173 Ill. 187, 50 N. E. Rep. 711. In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, it was held that an engineer who,

under the orders of the company, was regarded as conductor, was not a vice principal. These cases tend to show that the control of the train and crew must be complete, to constitute a foreman a vice principal. We fail to see how the conductor may be held to be a vice principal, as a matter of law, when, as a matter of fact, he is a fellow servant.

The findings of facts by the appellate court, that the plaintiff and the conductor were fellow servants, is conclusive on this court on that question, unless it is qualified by the further finding, "unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not." With the facts found that the relation of fellow servants existed, it cannot, as a principle of law, be held the relation did not exist. There is no evidence in this record showing that a vice principal relation of fellow servants existed. Where the evidence for the plaintiff is absolutely conclusive of the relation existing between master and servant, and reasonable minds would not differ as to whether the relation of fellow servants existed, in such case the question becomes one of law. *Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. Rep. 273. If this rule did not prevail, that a court could determine that the relation of fellow servants existed as a matter of law, and if a trial court, or court whose finding of facts must be held conclusive, could not adjudicate and determine that question of fact as a matter of law, then, where the facts are conceded or presented by the plaintiff alone, a court would be powerless to control the verdict, even though different minds would not differ as to the relation existing. *Railway Co. v. Brown*, *supra*. If it could not become a question of law under such circumstances, where it arises on the evidence introduced by the plaintiff alone, or where the evidence is not in conflict, then in no case could a trial court instruct the jury to find for the defendant where the relation of fellow servants existed, however conclusive might be the evidence in that behalf. The holding of the appellate court on the question of law presented constitutes a holding of law on conceded facts. The finding of the appellate court, under the facts appearing in this record as the basis of its judgment, is conclusive on this point. *Butler v. Cornell*, 148 Ill. 276, 35 N. E. Rep. 767; *Smith v. Billings*, 169 Ill. 294, 48 N. E. Rep. 693; *Anderson v. Association*, 171 Ill. 40, 49 N. E. Rep. 205.

The judgment of the appellate court is affirmed.

MAGRUDER, J., dissented.

UDELL V. CITIZENS' STREET RAILWAY COMPANY.

Supreme Court, Indiana, February, 1899.

BOY RIDING ON SIDE OF ELECTRIC CAR UNKNOWN TO EMPLOYEES AND FALLING OFF — TRESPASSER. — Where it appeared that a boy boarded a crowded trailer car on the left-hand side and stood on the boxing of the axle and held on to a portion of a seat with his hands, there being on that side of the car strips of wood to prevent the egress or ingress of passengers, and after riding in that position for some distance without paying fare or offering to do so, and without being asked for his fare, he not being seen by any employee of the railroad company, though he had money in his pocket sufficient to pay his fare, fell off and was run over, the company was not liable, as he was not a passenger but a trespasser, and the fact that he was a child nine years of age did not make him less so, if the other facts found compel the conclusion that he was wrongfully on the car.

STATUTE — SPECIAL VERDICT. — The act of March 11, 1895, amending the practice act and providing for special verdicts, is not unconstitutional as it does not change the law governing special verdicts except as to their form.

APPEAL from judgment, Superior Court, Marion County, in favor of defendant.

WILLIAM V. ROOKER, for appellant.

MILLER & ELAM, for appellee.

DOWLING, J. — Action for damages for a personal injury sustained by the infant appellant. There were two trials of the cause in the Marion Superior Court, the first resulting in a disagreement of the jury. On the second trial, upon the request of appellee, in writing, made before the introduction of any evidence, the court, agreeably to the requirements of the act of 1895, directed the jury to return a special verdict. Such special verdict was prepared by counsel on either side of the cause, was submitted to the court for revision, and was in the form of interrogatories properly framed. The court gave to the jury only such general instructions concerning their duties as are suitable where a special verdict is requested, and refused to give certain special instructions tendered on behalf of appellant. On the return of the special verdict, appellant moved for judgment in his favor upon it, which motion was overruled. He also filed a motion for a new trial, and the court overruled it. Judgment was thereupon rendered for appellee on its motion. Exceptions to these rulings were saved by appellant.

The errors discussed by appellant's counsel in their briefs, and

orally, are the ruling of the court on appellant's objection to appellee's request for a special verdict, the rulings on the motions for judgment on the special verdict, and the decision of the court on the motion for a new trial.

The first of these errors is not available to appellant, for the reason that no question touching the same is properly presented for the determination of the court. The appellee having filed its request for a special verdict, appellant filed his objection to it, in these words (title omitted): "The plaintiff objects to the filing of the defendant's request for a special verdict herein, for the reason that the same is filed pursuant to the act of March 11, 1895, concerning proceedings in civil cases, which act is unconstitutional and void, for the reason that it deprives the plaintiff of the right of trial by jury upon the issues as joined in the complaint and answer, and requires the jury to take from the court, and not from the pleadings, the questions to be decided by the jury." It will be observed that the objection was only to "the filing of the defendant's request for a special verdict." No demand was made, either before the introduction of the evidence or afterwards, that the jury be directed to bring in a general verdict. On the return of the special verdict no objection was made to it by appellant, nor was there at that time a request that the jury be sent back with instructions to make a general verdict. No motion was made for a *venire de novo*. If counsel for appellant thought they were entitled to a general verdict, they should have asked for it at the right time, and in the proper manner. If they thought the verdict returned by the jury was not the proper one, or that it was imperfect, they should have asked the court to set it aside and award a *venire de novo*. *Boseker v. Cramer*, 18 Ind. 44; *Tidd*, Prac. 922; *Smith v. Jeffries*, 25 Ind. 376; *Elliott*, Gen. Prac. sec. 935, and cases cited. The question as to the validity of the special verdict, however, is properly presented under the motion for a new trial and is considered in another part of this opinion.

Did the court err in overruling appellant's motion for judgment on the special verdict, and in rendering judgment thereon in favor of appellee? The special verdict shows that appellant at the time of the accident was a boy aged about eight years and seven months, of average size, strength, and intelligence; residing with his parents on Udell street, in the city of Indianapolis, three-fourths of one mile from a public resort known as "Armstrong's Park." The appellee was the owner of, and was operating, an electric railroad for the transportation of passengers in the city of Indianapolis and in North Indianapolis, in Marion county, Ind. On June 26, 1892, appellee stopped the train, consisting of a motor car and a trailer,

both being open or summer cars, with tops supported by posts, at Armstrong Park, for the purpose of receiving passengers. A long step or footboard ran along these cars on the right-hand side (when looking towards the front end), by means of which passengers entered upon the platforms or floors of said cars. The cars were provided with seats running across, from side to side, upon each of which five persons could be seated. On the left-hand side of the cars there was no step or other means of entrance, and wooden strips or slats extended from end to end on such left-hand side to prevent the ingress or egress of passengers. These slats were so adjusted that they could be raised or lowered to admit or discharge passengers on that side of the car. No passengers were received by appellee on the left-hand side of its cars at the park on the day mentioned, nor did appellee invite passengers to enter its cars on that side. Appellant, who was at Armstrong Park, got upon the forward part of the trailer car, on the left-hand side thereof; placing his feet on the boxing of the axle, and holding onto a portion of a seat with his hands. He neither paid any fare, nor offered to do so, nor was he asked for his fare by any employee of appellee. He had a nickel in his pocket, with which he could have paid such fare, and he intended to do so, if asked for it. He rode in the place described, in a stooping position, on the outside of the car, for about three-fourths of a mile, and until he arrived at Udell street, where he intended to get off. Here he was unable to retain his hold and fell off, and was run over by the wheels of the trailer. The right leg and the toes of the left foot were so crushed as to require amputation. After the train started, appellant exercised reasonable care, under the circumstances, to avoid being hurt. He could not have gotten off with safety from the time the train started until he fell, nor could he draw himself into the car, or release his hold, for the purpose of stopping it. The cars ran through from Armstrong Park to Udell street without stop. None of the employees of appellee saw the appellant when the train was in the act of starting, or while he was hanging on the outside of the trailer after the train was under way, although they might have seen him, if they had made an examination of that side of the car. No such examination was made. The place where appellant was riding was not a proper one, and was very dangerous. The car on which appellant rode was crowded with passengers, many of whom stood on the footboard or step and on the floor of the car. The position of some of these was such as to render it difficult for the employees of the appellee to see appellant. Some of these passengers were near to appellant while he was hanging on the outside of the car, and, if he had wished to

do so, he could have touched them or spoken to them; thereby making them aware of his presence, or asking them to stop the car. He did neither. When appellant came to the car at the park, there was no room for him to get upon it as a passenger. A bystander told appellant to go around to the left-hand side of the car and get on, and he acted on this suggestion. When the car left the park, the seats, the aisles between the seats, the platforms, and the foot or running boards were full of passengers. Before the day of the accident, appellant had been warned against hanging on the outside of street cars and riding there. He did not know that he had no right to do so, or that it was a dangerous place to ride. In the usual way of collecting fares upon the car on which appellant was riding, the conductor could have seen appellant, and appellant knew this. Appellant intended to pay his fare, when called upon. When the passengers were entering the car at Armstrong Park the conductor and motorman were temporarily absent from it, and took no part in assisting passengers to get on or in seating them. When appellant got upon the boxing of the axle at Armstrong Park, he did not comprehend the danger of his position, but afterwards became aware of it. While appellant was standing upon the boxing of the axle and hanging on the side of the car, the train was run at the rate of 18 or 20 miles per hour. Appellant first attempted to get on appellee's cars, as a passenger, from the platform at the east entrance of Armstrong Park, but was unable to do so on account of the crowd of persons on the cars. Appellee's servants in charge of the train could have stopped it after leaving Armstrong Park, and before reaching Udell street, if they had been asked to do so.

Upon a careful review of these facts, giving to the conductor of the appellant the most favorable construction, we do not think that they sustain the proposition that appellant was a passenger upon the appellee's cars, to whom appellee owed the duty of safe carriage and immunity from injury. Appellant was not in a place intended for passengers. He was not received as a passenger. His presence on the car was not made known to appellee's agents and servants. He did not conduct himself as a passenger. Appellee's servants were not required to search for trespassers before starting the cars, and appellee was not bound to discover appellant, and remove him from the perilous situation in which he had voluntarily placed himself. The distressing consequences of the act of appellant in standing on the outside of the car, on the iron boxing of the axle, cannot be said to be the result of any act or omission of appellee or its employees. The circumstance that appellant had a nickel in his pocket, with which to pay his fare when called upon,

did not make him a passenger. If he did not intend to pay his fare unless called upon, and left the car, or attempted to leave it, without paying such fare, that fact of itself would be entitled to weight in determining the question of his right on the car. It is shown by the special verdict that, although the train was run at a high rate of speed from Armstrong Park to Udell street, appellant was able to maintain his hold, and did not fall off, until he arrived at or very near his destination, and that the rate of speed of the cars when approaching Udell street was generally reduced. As the special verdict fails to show that appellant was a passenger, the rules concerning the overloading of street cars and the duty of street-car companies to passengers, stated in *Pray v. Railway Co.*, 44 Neb. 167, 62 N. W. Rep. 447, and the cases there cited, do not apply. The fact that appellant was a child aged eight years and seven months did not make him any less a trespasser, if the other facts found compel the conclusion that he was wrongfully upon the car. If, after an ineffectual attempt to get on the car at a proper and usual place, he abandoned that intention and became a trespasser, he lost the right to that measure of care and protection which a carrier of passengers is required to extend to one who seeks to be carried as a passenger. The theory of both paragraphs of the complaint is that appellant was a passenger on appellee's car. The special finding does not sustain this theory. On the contrary, the only conclusion which can be drawn from the facts found is that appellant was wrongfully upon the car, in an improper, unusual, and dangerous place, that he was not known to be there by appellee's employees in charge of the train, and that the consequent injury was due to his voluntary exposure of himself to evident peril. We find no error, therefore, in the action of the court in overruling appellant's motion for judgment on the special verdict, and in rendering judgment for appellee.

The constitutionality of the act of March 11, 1895, amending the practice act, and providing for special verdicts, is called in question, and a decision upon it is involved in the refusal of the trial court to give the special instructions tendered by appellant. Two points are made in support of this objection: First, that the subject of the act is not expressed in the title; and, second, that the act violates the right of trial by jury.

The title is as follows: "An act to amend section 389 of an act concerning proceedings in civil cases, approved April 7, 1881, and designated as section 546 of the Revised Statutes of 1881." The act so amended is entitled "An act concerning proceedings in civil cases." Laws 1881, p. 240. That the title of the act of March 11, 1895, sufficiently complies with the requirements of the constitution,

has been frequently decided by the courts of this State. Like decisions have been made by the courts of Louisiana, from the Constitution of which State this provision is said to have been borrowed. *Greencastle Southern Turnpike Co. v. State*, 28 Ind. 382; *Walker v. Caldwell*, 4 La. Ann. 297; *Duverge v. Salter*, 5 La. Ann. 94; *Blake-more v. Dolan*, 50 Ind. 194. It is said in *Greencastle Southern Turnpike Co. v. State*, *supra*, that: "Since the decision in *Walker v. Caldwell*, *supra*, the Legislature of Louisiana, with a few exceptions, has adopted the following formula: 'Be it enacted,' etc., 'that — section of an act entitled,' etc., 'be amended and re-enacted so as to read as follows.' " A formula substantially like this was adopted by the general assembly of the State of Indiana at least as early as March 2, 1853, and the same has been used by every Legislature in this State since that date. There is nothing in the first point.

Does the act of March 11, 1895, violate the right of trial by jury? In our opinion, it does not. Except as to their form, the act of March 11, 1895, did not change the law governing special verdicts as it had existed in this State since 1852. The Civil Code of 1852 required the court, at the request of either party, to direct the jury to give a special verdict in writing upon all or any of the issues, and in all cases, when requested by either party, to instruct them, if they rendered a general verdict, to find specially upon particular questions of fact to be stated in writing. 2 Rev. St. p. 114, sec. 336. This provision continued in force until the enactment of March 11, 1895. Its validity was not questioned. Acquiescence in the constitutionality of this statute for so long a period by the courts of this State is a circumstance of some weight in determining the question of the validity of a similar statute. Independently of this consideration, however, we are unable to perceive that the statute under examination in any way invades the province of the jury, or deprives the citizens of this State of any common-law right connected with a trial by jury to which, under the Constitution, they are entitled. In civil actions, under the Constitution of this State, the jury never possessed the right to decide questions of law. Their inquiries have always been confined to matters of fact. The scope of such inquiries is not abridged by the act of March 11, 1895. The argument of counsel founded upon the distinction between primary facts and inferences or conclusions from facts is unsound. If an inference or conclusion from a fact or facts is itself a fact proper to be found by the jury, it may be made the subject of an interrogatory. But if the proposed inference or conclusion from a fact or facts is not itself a fact, but a conclusion or inference of law, then

the jury has no right to find such conclusion or inference. The statute in question authorized either party to submit to the jury every essential question of fact, together with every proper inference or conclusion of fact. If parties to actions did not avail themselves of this privilege, it was not because of any defect or prohibition in the law. We have examined *Railroad Co. v. Stout*, 17 Wall. 657; *Patterson v. Wallace*, 1 Macq. 748 (1); *Mangam v. Railroad Co.*, 38 N. Y. 455; *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Railroad Co. v. Harrington*, 131 Ind. 426, 30 N. E. Rep. 37; *Railroad Co. v. Walborn*, 127 Ind. 142, 26 N. E. Rep. 207; *Mann v. Railroad Co.*, 128 Ind. 138, 26 N. E. Rep. 819; *Railroad Co. v. Grames*, 136 Ind. 39, 34 N. E. Rep. 714, — cited by counsel for appellant, and find nothing in them inconsistent with the views expressed in this opinion. If the jury is required to find any conclusion of law in answer to an interrogatory, such finding must be disregarded. *Railway Co. v. Miller*, 141 Ind. 544, 37 N. E. Rep. 343; *Roller v. Kling*, 150 Ind. 159, 49 N. E. Rep. 948; *Weaver v. Apple*, 147 Ind. 304, 46 N. E. Rep. 642.

Appellant complains of the refusal of the trial court to submit to the jury certain interrogatories prepared and tendered on his behalf. The act regulating special verdicts expressly authorized the court to change and modify the interrogatories prepared by counsel. One hundred and forty-four interrogatories were submitted to, and answered by, the jury. They covered every material question of fact in the case. Many of those tendered by appellant's counsel called for mere opinions, for conclusions of law, and for facts which were evidentiary, and the court did right in excluding them.

It is further objected that the court erred in refusing to give special instructions numbered from one to six tendered by appellant's counsel. It is sufficient to say that where a special verdict is requested no instructions are proper, except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, and who has the burden of proof as to the facts to be found, with whatever else may be

1. In *Patterson v. Wallace*, 1 Macq. 748 (House of Lords, Scotch Appeals, July, 1854), an action for damages for the death of one of defendant's employees who was accidentally killed while working in a coal pit, it was held that when there is evidence that by possibility may lead to a particular result, the question of fact ought to be left to the jury. Therefore, where the

judge — holding that certain facts were proved — told the jury that the Pursuers [plaintiffs] could not recover, and they thereupon returned a verdict for the Defenders [defendants] — The House decided that the judge had done wrong; for the question of fact was one not for him but for the jury to determine.

necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein. *Roller v. Kling*, 150 Ind. 159, 49 N. E. Rep. 948. The court gave to the jury all instructions necessary to enable them to understand their duties concerning the special verdict and the facts to be found therein. It was neither necessary nor proper for it to give general instructions as to the law of the case. *Roller v. Kling*, *supra*, and cases cited.

The motion for a new trial was properly overruled. Finding no error in the record, the judgment is affirmed.

INDIANA, ILLINOIS AND IOWA RAILROAD COMPANY v. BUNDY.

Supreme Court, Indiana, March, 1899.

MASTER AND SERVANT — INJURY TO BRAKEMAN COUPLING CARS BY FALLING OVER SWITCH WIRES. — Where the plaintiff, while attempting to couple cars near a switch yard, was injured by falling over uncovered signal wires, and the evidence tended to show that in switch yards the generally approved method was to box such wires, the question of negligence of the company in maintaining such wires uncovered was for the jury, though the evidence also tended to show that the general mode of constructing the signal wires outside the switchyard was to leave them uncovered.

RISK OF EMPLOYMENT. — Whether plaintiff assumed the risk of the open wires was for the jury, where it appeared that he was a rear-end brakeman, and his station was on top of his train; that he had several times observed the boxed wires but had not noticed that the boxing ended 300 feet from the station, where he was at the time of the observation and that was distant from where the accident occurred.

EVIDENCE. — Evidence of a foreman that he had repeatedly notified the railroad company's superintendent that the uncovered wires were dangerous to the men, was properly admitted.

EVIDENCE — RULES. — Rules relating to the duties of employees offered in evidence were properly excluded without proof that such rules had been given or tendered to such brakeman or his attention called to them.

NOTICE TO EMPLOYEES. — A railroad company cannot establish freedom from negligence by showing the construction of its switch device to be similar to the construction of like devices upon another first class road without further showing, if the construction was dangerous to employees about it, notice of the danger had been given.

APPEAL from a judgment, Circuit Court, Lake County, in favor of plaintiff.

F. S. FANCHER and H. K. WHEELER, for appellant.

E. D. CRUMPACKER and GRANT CRUMPACKER, for appellee.

HADLEY, J. — The evidence discloses that the appellant owned and operated a railroad extending from Streator, Ill., to Knox, Ind., and in connection therewith operated a leased line from Wheatfield, Ind., a station on their main line, to North Buffalo, Mich. Appellee, who was plaintiff below, went into the employment of appellant in December, 1891, as a brakeman on a freight train, and continued in the same capacity till December 22, 1894, when, while attempting to couple cars in the switch yard at North Judson, Ind., he fell over uncovered signal wires along the track, and his arm caught between the deadwoods and was crushed. North Judson is a station at which appellant's road, running east and west, is crossed by the Erie and Panhandle Railways, running north and south, which three companies maintain at North Judson an interlocking switch device. The east signals on appellant's road are operated by two wires, less in size than telegraph wire, running eastward from the crossing on the south side of appellant's main track, 300 feet, to the derail. They at that point cross under the track to the north side, and thence extend eastward, parallel with, and forty-two inches from, the north rail of the main track, 1,200 feet, to the distant signal. These wires are boxed from the crossing to the derail. From that point eastward to the distant signal they are uncovered, and rest upon pulleys set in the top of posts, three inches from the ground, and about forty feet apart. The ground over which the wires run is sandy. The operating wires are similarly constructed west of the crossing, except that on the west the wires are boxed for a distance of 360 feet. The appellant, among others, maintains a side track south of its main track, east of the crossing, which extends to the eastward about 700 feet east of the distant signal, and, west of the crossing, a side track on the north side of its main track, extending westward about half a mile, and about 1,000 feet west of the west distant signal. The Erie maintains "yards" on the east of the crossing, and the Panhandle "yards" are on the west of the crossing, and north of appellant's tracks. The interchange of cars among these roads was so considerable as to make it necessary for appellant to maintain at this point a switch engine, and a switching force of five men, including engineer and fireman. This switching crew performed all the switching at this point. It would collect the cars from the yards of the other two companies, and place them in train order, — those to go west on appellant's side track above described west of the crossing, and those to go east on the side track east of the crossing, — to be taken out by appellant's through freight trains

from the west and east ends, respectively, of said side tracks. Soon after appellee's employment, in 1891, appellant constructed interlocking switches at Dwight and Momence, Ill., and in September, 1892, constructed the one at North Judson, and also had a similar device at Magee and Laporte, on the New Buffalo Branch. At these several points the wires from the derail to the distant signals were uncovered, and constructed in a manner similar to the one at North Judson. At Dwight the exposed wires were on the south side of the main track, and from a siding on the opposite side of the main track appellee had frequently coupled cars to his train, performing the work from each side of the side track, but usually from the north side. At the other points where interlocking systems were maintained except North Judson, no switching or coupling or uncoupling of cars was done in the vicinity of the exposed wires. For a period of two years after the construction of the interlocking systems, and next before the accident, appellee made from two to four trips a week over the road; two-thirds of the trips being from Streator to New Buffalo, and one-third to Knox, via North Judson, passing the latter place twenty-five or thirty times in daylight. His station in travel was on top of the train, or in the cupola of the caboose. The outside walls of the freight cars projected two and one-half feet outside the rails. Appellee was occasionally on the station platform at North Judson in daylight, but never walked on the ground along any part of the uncovered wires to reach the platform. The wires operating the switch and signal are boxed for 300 feet eastward from the station platform, and 360 feet westward. Six days before the injury, appellant had opened an extension of its road to South Bend, and discontinued and removed its switching crew from North Judson, thus imposing upon train crews the duty of switching and picking up cars at the latter place. Appellee was returning from his third trip to South Bend, and at 12:30 o'clock a. m. was called upon to couple a car to his train at a point from 325 to 340 feet east of the crossing. It was dark, and appellee had in his hand a lighted lantern, with which he twice signaled the engineer to back slowly, and, being occupied in observing the movement of the train, at the proper moment attempted to step in and make the coupling, but lodged his foot under the open wires, and, falling towards the train, threw himself forward in an effort to reach the deadwoods, to avoid falling across the rail; and thus his arm was caught between the deadwoods and crushed, making amputation above the elbow necessary. This was appellant's first attempt at coupling or uncoupling cars in that vicinity, or east of the crossing. He had never seen the open wires at that station. He had never been informed that they

were open. He did not know they were open, and did believe they were all boxed, at that crossing. No objection to this complaint is urged by appellant, and the questions discussed all arise under the motion for a new trial. The negligence charged against the appellant is in maintaining the wires along the side of its road in an uncovered and exposed condition, at a point where its employees are required to go in to couple and uncouple cars. The insufficiency of the evidence to sustain the judgment below is urged by appellant.

It is a familiar rule that railroad companies are required to construct their roadways and appurtenances in such a manner as will enable their employees to perform the labor required of them with reasonable safety. *Railway Co. v. Sandford*, 117 Ind. 265, 19 N. E. Rep. 770; *Same v. Wright*, 115 Ind. 378, 385, 16 N. E. Rep. 145, and 17 N. E. Rep. 584. This rule requires a railroad company, in any structure erected by it, to have regard for the safety of its employees while engaged in discharging their duties in relation thereto. The environments of the situation, the nature and extent of the services required of its employees, must have potent consideration, and such structure accomplished in a manner that has in view the highest degree of safety that ordinary care will provide. The appellant is excused if it maintains its roadway and appendages in a fashion generally approved and adopted by other first-class railroads of the country. But in this case the evidence tends to show that, while the general mode of constructing interlocking switch devices is to leave the wires uncovered from the derail to the distant signals, yet it also tends to prove that in switch yards, and places where a large amount of car handling is required, the generally approved and usual method of first-class roads is to box the wires at such places. Without any doubt, the evidence is of a character to carry to the jury the question of appellant's negligence in maintaining uncovered wires at the place of appellee's injury.

Appellant further insists that, aside from the question of its negligence with respect to the open wires, there can be no recovery, for the reason that the danger, whatever it was, was apparent and known to appellee, and assumed by him, in his continued voluntary service with the company. It is a well-established rule that one entering the service of a railroad company must do so with his eyes open, for he will be held to assume all the usual and obvious dangers incident to the employment. He must heed appearances and note consequences, and if, by his carelessness, he overlooks that which he might have observed by the exercise of ordinary care, his want of knowledge will be no excuse in case of injury. *Coal Co. v. Hoodlet*,

129 Ind. 327, 27 N. E. Rep. 741; *Railway Co. v. Buck*, 116 Ind. 566, 573, 19 N. E. Rep. 453; *Railway Co. v. Roesch*, 126 Ind. 445, 447, 26 N. E. Rep. 171; *Same v. Lang*, 118 Ind. 579, 583, 21 N. E. Rep. 317. But, while the employee is thus held to diligence for his own safety, he has the right to repose confidence in the prudence and caution of his employer, and may rightfully presume that the employer, with respect to the same object has performed his duty, and has invested all places and situations with such safeguards as ordinary prudence requires. *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. Rep. 380; *Railroad Co. v. Duel*, 134 Ind. 156, 33 N. E. Rep. 355, and cases cited. The evidence adduced is not of a character to warrant this court in saying, as a matter of law, that the risk of the open wires was assumed by appellee. There was evidence that there were two light-colored wires, "less than telegraph wires," drawn over, and four inches above, a sandy roadbed. Appellee was a rear-end brakeman on a through freight train, and his post of duty in travel was on top of his train, or in the cupola of the caboose. The line of wires was twelve inches out from the outer walls of the moving freight cars, and not observable from the top of the train. Appellee had passed the wires twenty-five or thirty times in daylight, but before the accident had not been on the ground at any point along the uncovered wires east of the crossing, and did not know they were uncovered, and believed they were boxed. The wires were boxed, with boards about eighteen inches wide on top, and six inches high, for a distance of 300 feet east and 360 feet west of the crossing. The boxed wires on the east side were on the south side of the main track for the first 300 feet from the crossing. Appellee had been several times on the station platform at the crossing, and had observed the boxed wires on the south side of the main track, but had not observed that the boxing ceased 300 feet to the east, or that at that point the wires crossed the main track to the north side, and proceeded thence eastward to the distant signal uncovered, and had not been notified, and did not know, that such was the fact. The accident occurred about midnight. Appellee walked for some distance on the north side of the main track, along the exposed wires, about a rod distant, with a lighted lantern in his hand, to where the car stood that he was directed to couple to his train. He, and the backing train, arrived at the standing car about the same time. He signaled twice with his lantern to back slowly. His mind was absorbed in the moving train, and the exact moment when he must act to make the coupling. His line of vision at the time and place of the injury was necessarily above the wires. It is

clear that upon these facts the question was with the jury to say, upon the whole evidence, whether appellee had assumed the risk of the open wires. *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. Rep. 714; *Car Co. v. Parker*, 100 Ind. 181, 197, and cases cited; *Rush v. Mining Co.*, 131 Ind. 135, 30 N. E. Rep. 904; *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. Rep. 1039. Appellant cites numerous cases in support of its contention that the risk was an assumed one. But it must be borne in mind that the rule contended for is relative, and not absolute, and its application must be determined by what constitutes reasonable and ordinary care, under the facts of each particular case. In the case of *Railroad Co. v. Ostman*, 146 Ind. 452, 45 N. E. Rep. 651, the plaintiff's decedent was killed by a cattle chute that stood within thirteen inches of the outer wall of a passing locomotive cab, and eight and one-half feet high, with board wings and gates, and could be easily seen by the trainmen for a half mile in either direction. The deceased, as a locomotive fireman, had passed the chute twice each week for sixteen months, and had frequently aided in switching cars by it. At the time of his injury he was engaged in switching, and having carelessly thrust his head out of the cab window, and thus riding with his face to the rear, he collided with the chute and was killed. In the case of *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. Rep. 816, the injured party, from inattention, was knocked off the train by a water crane that stood seventeen feet high and four feet from the track, and which he had passed almost daily for six months, and could see it for half a mile from either direction. In the case of *Paper Co. v. Webb*, 146 Ind. 303, 45 N. E. Rep. 476, the plaintiff was injured by being caught by a projecting oil cup and clutch on a revolving shaft. The shaft and projecting clutch were fully exposed. He had worked in the mill about two years, and about the particular machine for about three weeks, and had oiled the very clutch that caught him. In these and other cases cited, of similar import, the court held that the servant had assumed the risk, but the material facts in these cases are not analogous to the facts under consideration. The danger in these cases was easily apparent, was immediately present, and stood out so prominently as to press observation upon the servant of ordinary intelligence. We do not mean to say that, to charge the servant with an assumption of the risk, the evidence of danger must be as strong and cogent as it appears in these cases; but we do say that the presence of danger must be obvious from such appearances as will put a man of ordinary prudence and caution upon his guard, or the servant will be excused. Duty had taken appellee along the exposed wires whereby he was hurt. He knew that the

distant signals of interlocking switch devices were operated from the tower by wires, but, according to his testimony, his observation had been that the wires were covered through switching yards of other roads, and left exposed where no car handling was required. East of the crossing, and near the station platform, where he had been a number of times in daylight, the wires with which the eastern signals were operated were constructed on the south side of the main track, and boxed with boards from the crossing eastward for about eighteen rods. If any presumption will arise from this situation, it will be that the wires continue on the south side of the main track to the distant signal. Surely, under the evidence adduced, there could be no presumption arise that at a point about eighteen rods east of the crossing the wires ceased to be boxed, and there crossed from the south to the north side of the main track, and thence along the north side to the signal. Furthermore, it may well be doubted, if a person of ordinary vision, standing on the station platform, can see two light-colored wires, "less than telegraph wires," beginning 300 feet away, and stretched four inches above a sandy background, and, if possible to see them, whether the situation was such as to attract the attention of a man of ordinary caution to the fact. Appellee was not bound to know of latent perils, nor was he required to hunt after them, but he is exonerated if he heeded such cautionary manifestations as would put a man of ordinary prudence and caution upon inquiry. We think it is clear that the question of appellee's knowledge of the exposed wires, and his means of knowledge, by the exercise of reasonable caution, was a question for the jury.

Appellant insists that the court erred in denying it the right to show that other first-class roads had their interlocking switch devices constructed in the manner similar to the one in controversy. The court permitted appellant to give evidence touching the practice of railroads generally in the construction of interlocking switches, but denied it the right to show particulars in construction, other than upon the line of appellant's road. In this the court committed no error. *Railroad Co. v. Mugg*, 132 Ind. 168, 175, 31 N. E. Rep. 564; *Railway Co. v. Wright*, *supra*; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. Rep. 421; *Colf v. Railroad Co.*, 87 Wis. 273, 276, 58 N. W. Rep. 408.

The court permitted, over appellant's objection, one Harvey, who was foreman of the switch crew at North Judson, and had worked over and about the open wires in question, to testify that prior to appellee's injury he repeatedly notified appellant's general superintendent that the exposed wires within the yard limits at North Judson

were very dangerous to the men at work around and over them, and also to state the superintendent's reply. This decision of the court is fully supported by the case of *Railway Co. v. Wright*, 115 Ind. 393, 16 N. E. Rep. 145, and 17 N. E. Rep. 584, and cases there cited.

Appellant's rules 607 and 608 for the government and information of employees were offered in evidence. Appellant's learned counsel say in their brief: "These rules were offered in evidence for the purpose of showing that it was the duty of Bundy to examine the condition of all machinery, tools, tracks, cars, engines, or whatever he might undertake to work with, before he made use of the same, and ascertain their condition, for his own safety." The law required of Bundy such inspection and examination of all places and appliances where and with which he was put to work as a man of ordinary care and caution would make in a like situation, and it can hardly be claimed that the rules refused enjoined upon the employee a higher degree of care. Bundy, appellee, went into the service of the company in December, 1891, and the rules in question were promulgated in September, 1893. The evidence tended to show that the rules were printed on time-table No. 28. Bundy, on cross-examination, denied that he ever received a copy of the rules, and claimed he never had, as his own, a copy of time-table 28, but sometimes got the conductor's, and had access to copies of said table to be found in the caboose. No effort was made by appellant to prove that a copy of the rules was ever given or tendered to Bundy, or his attention directed to them, except as was shown by his cross-examination, with result as indicated above. Neither was there any effort made by appellant to prove that Bundy had violated any provision of the rules offered. *Railway Co. v. Mugg*, 132 Ind. 173, 31 N. E. Rep. 564. Without some further evidence that appellee had received the rules, or had knowledge of their contents, the court was warranted in excluding the evidence.

Another reason for a new trial is that the court erred in refusing to give to the jury certain instructions, and in giving of its own motion certain other instructions. Appellee claims that the instructions asked by appellant and refused are not in the record, because prematurely presented. The recitals of the clerk in the record show that (December 4, 1896) "thereupon, before the argument, the defendant now tenders to the court, and asks the court to give to the jury at the proper time, certain written instructions, which are by the court refused, and the defendant separately except to each instruction refused to be given by the court; and said exceptions are indorsed on the margin of each of said instructions, and said

exceptions are respectively signed by the court, and are thereupon ordered filed and made part of the record, without a bill of exceptions, and are in the words following: ' There follow twenty-one instructions, on the margin of each of which are these words, " Refused and excepted to this December 4, 1896. John H. Gillett, Judge;" and upon the same day the further entry and recital, " And the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury, and each party at the time now excepts to each instruction given by the court to the jury, and their respective exceptions are noted upon the margin of said instructions, and respectively signed by the court, which instruction so given by the courts, and the said exceptions thereto, are now likewise ordered filed, and made a part of the record herein, and the same are in the words following, to wit." Next follow thirteen instructions, with the words following indorsed on each: " Given and excepted to December 4, 1896. John H. Gillett, Judge." It is insisted by appellee that, since it appears from the first entry that " before the argument " the defendant tenders its instructions, and in the subsequent entry of the same day that " the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury," we must construe the record as disclosing that appellant presented its instruction to the court and obtained the court's rulings thereon, and reserved exceptions, before the close of the evidence, and that inasmuch as the record does not show that appellant's instructions were again presented, rulings had, and exceptions reserved, after the close of the evidence, therefore it affirmatively appears that the tender of the instructions was untimely, and presents no question for this court. We cannot agree with the learned counsel for appellee in this instance. Even if this court was bound by the recitals of the clerk, we could not give the record the construction contended for. The recital is that " before the argument " (not before the close of the evidence) the defendant presented its instruction, to be given " at the proper time." And even if the tender was made before the evidence closed, as insisted, that will furnish no reason why appellant's right to exceptions should be prejudiced. The preparation of instructions is a delicate task, and should always be performed with deliberation and care, and should never be postponed till after the evidence is closed, only in exceptional cases, and as to exceptional facts. There are most excellent reasons why the fair and cautious attorney should prepare his instructions before, or during the progress of, the trial, and tender them to the court at the earliest moment, that he may have time for full consideration.

It is the duty of the court not to act adversely upon instructions until the evidence is all in, unless it seems clear that they are improper under any possible evidence, in which case, if the court in fact acts, and indorses his refusal thereon, during the progress of the evidence, and subsequently withholds them from the jury, it cannot be said that the party thereby loses his right to exceptions, if timely taken. All inferences are in favor of the right action of the court, and, upon the record before us, we conclude that, without regard to the stage of the trial at which the instructions were presented, it was the duty of the court to act upon them, and that it did act upon them, in view of all the evidence, and that the exceptions reserved by appellant related to the act of the court, whenever that duty was actually performed, at any time before final submission.

It is further insisted by appellee that appellant failed to save exceptions to the refusal of the court to give to the jury the instructions asked. Burns' Rev. St. 1894, sec. 544, provides that it shall be sufficient to save exceptions by writing on the margin of each instruction the words, "Refused and excepted to," to be signed by the judge and dated. The instructions asked by appellant had indorsed on the margin of each: "Refused and excepted to December, 4, 1896. John H. Gillett, Judge." It is true that these marginal notes do not disclose which party excepted, but it was a ruling that did not concern appellee, and one about which he could not complain, nor be entitled to an exception; hence, it must be held that they were the exceptions of appellant. The instructions asked by appellant and refused, and the exceptions thereto, are therefore properly in the record.

The instructions given by the court of its own motion are in the record, both by order of court and bill of exceptions, but it is urged by appellee that appellant has saved no exceptions thereto. Outside the recitals in the order book set out above, no exceptions by either party appear anywhere in the record, except that there is written on the margin of each of the instructions so given to the jury the following words: "Given and excepted to December 4, 1896. John H. Gillett, Judge." Exceptions to instructions must be saved in the manner prescribed by statute, or by order of court or bill of exceptions. *Railway Co. v. Dunn*, 138 Ind. 18, 36 N. E. Rep. 702, and 37 N. E. Rep. 546; *Childress v. Callender*, 108 Ind. 394, 9 N. E. Rep. 292; *Fromlet v. Poor*, 3 Ind. App. 425, 430, 29 N. E. Rep. 1081. Recitals in an order book are not a statutory mode. Section 544, *supra*. To be saved by a bill of exceptions or order of court, "what occurred in the way of exceptions to the giving of instructions must be stated in the bill or order as facts, and be authenticated

by the signature of the judge." *McKinsey v. McKee*, 109 Ind. 209, 212, 9 N. E. Rep. 771. The bill of exceptions before us recites, "Be it remembered that at the proper time after argument the court, of its own motion, gave to the jury the following instructions, numbered one to fourteen, inclusive." Then follow fourteen instructions, each having written at the bottom the words: "Given and excepted to December 4, 1896. John H. Gillett, Judge." And following the last are these words: "And these were all the instructions given by the court in the above-entitled cause. John H. Gillett, Judge Lake Circuit Court." Nowhere in the bill is it stated as a fact, or even recited, that either party took or reserved exceptions. It therefore follows that we must look exclusively to the words, "Given and excepted to," written on the margin or at the bottom of each instruction, in determining the sufficiency of the exceptions. Without extrinsic support, there seem nothing for them to stand upon. Both parties were equally affected by the instructions, and both equally entitled to exceptions. But which party took them is not affirmatively shown. The law permits no such uncertainty in appeals. The court cannot be called upon to reverse the court below, unless error is clearly presented by the record, properly authenticated. *McKinsey v. McKee*, *supra*. To be sufficient to reserve exceptions to the giving of instructions, the marginal memoranda should also state the party in whose behalf the exceptions are allowed. The record discloses no exceptions on behalf of appellant to the instructions given by the court, and hence no question arises upon them in this court.

We come now to the final inquiry. Did the court err in refusing to give to the jury the instructions asked by appellant? Numbers 2, 12, 15, and 16 are the only ones discussed in appellant's brief. The second, in substance, stated that the plaintiff charged in his complaint that the defendant had two wires extending along the north side of its main track east of the crossing at North Judson; that said wires were uncovered and exposed, and that plaintiff had no knowledge, or means of knowledge, that said wires were uncovered; and that if the jury believed that the plaintiff frequently worked at North Judson, around and over said wires, and by the exercise of ordinary diligence he could have discovered them; then it makes no difference in this case whether or not he actually discovered them. The court informed the jury, in its No. 4, that a servant assumes, not only the ordinary risks of the employment, but he also assumes every risk due to defective appliances of which he had knowledge, or of which he is put upon notice by circumstances coming to his knowledge, which would be reasonably calculated

to put a person of ordinary prudence upon his guard as to the existence of such defects, and in No. 5 charged: "If the plaintiff had actual knowledge that the uncovered wires were at the place where he was injured, that destroys his right of action. If he ought to have known them, or been on his guard against them, the result must be the same." Reading Nos. 4 and 5 together, they cover all the facts embraced in appellant's request No. 2, and more, and put the case in a light quite as favorable to the appellant as did its own, and quite as favorable as appellant was entitled to have it presented.

Appellant's request No. 12 is as follows: "12. The court instructs the jury that if you believe from the evidence that the plaintiff received the injury complained of while coupling cars on the company's main track at North Judson, Indiana, then the defendant is required to construct its wires no better and safer along the main track than other first-class railroads constructed similar wires along their main tracks; and, if you believe from the evidence that other first-class railroads constructed such wires by leaving them open and exposed as the defendant did, then your verdict should be for the defendant." This falls short of an accurate statement of the law. It is too narrow. Appellant cannot establish freedom from negligence by showing the construction of its switch device to be similar to the construction of like devices upon another first-class railroad, without further showing, if the construction may be dangerous to employees at work about it, that it had given notice of the danger, or given the servant such an opportunity to observe it as would have put a reasonably prudent person upon his guard. Furthermore the proper inquiry is not what other first-class railroad companies have done, — perhaps in exceptional instances, — but what is the general usage in this regard. This instruction contains no such limitation. Nos. 15 and 16 state the same proposition in slightly different language, the substance of which is that if the jury believe that, prior to plaintiff's injury, he knew that an interlocking switch device was maintained by appellant at North Judson, and that it required wires to extend along the track for its operation, then he was bound to look, and see the wires extended along the track where he worked, and, if he fell over them and was injured, he cannot recover. This implies that if appellee knew the method of operating interlocking switches, and that one was at North Judson, then he was bound to know the particular ground occupied by the wires, without reference to appellee's opportunity for observation or inquiry, or to the number of tracks running east from the crossing, or the particular side of the track occupied, or appeared to be occupied from the only point of view

ever had by appellee. Such a rule would utterly strip appellee of all protection afforded by ordinarily prudent and cautious conduct in his situation. Nos. 15 and 16 were also rightfully refused. The instructions given by the court covered all the material facts and phases of the evidence, and stated the law applicable thereto with admirable precision and clearness.

We have reviewed all of the alleged errors discussed by the learned counsel for appellant, and we find no error in the record. Judgment affirmed.

TERRE HAUTE ELECTRIC RAILWAY COMPANY v. LAUER.

Appellate Court, Indiana, January, 1899.

PASSENGER IN STREET CAR VACATING SEAT AND STANDING ON PLATFORM AT REQUEST OF CONDUCTOR — COLLISION OF CARS.

— It is not negligence *per se* for a passenger to ride on the platform of a car whether he does so of his own motion or at the request of the conductor for all gentlemen to vacate their seats in favor of ladies and stand upon the platform.

REQUEST EQUIVALENT TO DIRECTION. — Such a request from the conductor was equivalent to a direction which it was the duty of the passenger to follow, unless it was apparent to him that it would be unsafe to do so.

PLEADING — PROOF. — Under an allegation of a complaint that the plaintiff was injured in a collision of two of defendant's street cars while he was riding on the platform of one of them, at the request of the conductor, the plaintiff may recover without proving the request of the conductor to stand on the platform.

APPEAL from judgment, Circuit Court, Clay County, in favor of plaintiff.

GEORGE A. KNIGHT and McNUTT & McNUTT, for appellant.

AZRO DYER and JOHN BROWLEE, for appellee.

COMSTOCK, J. — This action was commenced in the Superior Court of Vigo county, and tried in the Clay Circuit Court upon change of venue. The complaint is in one paragraph and charges, in substance, that on the 2d day of October, 1895, the defendant was a corporation duly organized under the laws of Indiana, engaged in operating an electric street railroad in the city of Terre Haute; that on the night of said day the plaintiff went into a car of the defendant, occupied a seat therein, and paid defendant's conductor in charge of said car the sum of five cents, and was received as a passenger on said car; that, proceeding on its way, said car became crowded with

passengers, several of whom were ladies, and said "conductor in charge of said car requested that some of the gentlemen passengers should vacate their seats in favor of such ladies, and stand and ride upon the rear platform of said car, and thereupon, in obedience to said request, this plaintiff gave up his seat, and stood and rode upon the rear platform of said car;" that, while so riding, the defendant carelessly and negligently, with great force and violence, suddenly, at a high rate of speed, ran another of its cars against and into the rear platform of said car upon which plaintiff was standing, and thereby crushed and broke said platform, and caught, mashed, and crushed plaintiff's body between the ends of said cars, thereby injuring, wounding, and bruising plaintiff's side, hips, and thighs; that said injuries were not caused through any fault or negligence on his part, and that by reason of said injuries he has suffered, and still suffers, great mental anguish and physical pain; that he has been compelled to expend a large sum of money for medical attention, etc.; that he has been permanently disabled, and rendered incapable of performing and following his vocation, to wit, that of real estate broker, receiver, assignee, and trustee; that his health has been impaired; and that by reason of said injuries plaintiff has sustained damages in the sum of \$20,000. The cause was put at issue by general denial, tried by jury, and a verdict returned in favor of appellee, upon which a judgment was rendered for \$1,500.

The first and second specifications in the assignment of errors question the sufficiency of the complaint; the third, the action of the court in overruling appellant's motion for a new trial.

In questioning the sufficiency of the complaint, appellant's learned counsel do not insist that it is negligence *per se* for a passenger to ride on the rear platform of a street car, but claim that it was negligence for appellee to leave a place of safety, which he was occupying, for a place obviously more or less dangerous, upon the general request of the conductor; that there is nothing in the complaint to show that when he surrendered his seat he might not have remained standing in the car, instead of on the platform, on the outside; that there is no allegation that there was not room for appellee to stand on the inside of the car. The proposition that it is not negligence *per se*, but a question of fact for the jury, for a passenger on a street railway to ride upon the platform, has been decided in many decisions. *Railroad Co. v. Shaffer*, 9 Ind. App. 486, 36 N. E. Rep. 861; *Nolan v. Railroad Co.*, 87 N. Y. 63; *Maguire v. Railroad Co.*, 115 Mass. 239; *Burns v. Railway Co.*, 50 Mo. 139 (1); *Railroad Co.*

1. *Burns v. Bellafontaine R'y Co.*, 50 Mo. 139, is reported in 4 Am. Neg. Cas. 477.

v. Fisher, 141 Ill. 614, 31 N. E. Rep. 406; *Beal v. Railway Co.*, 157 Mass. 444, 32 N. E. Rep. 653. Whether one ride on the platform of his own motion, or upon the request of the conductor, would not be material. The rule would be the same in either instance. We think it clear, too, that it is the duty of the passenger to follow the reasonable instruction, and rely on the judgment of those in charge of the car, in regard to moving from one part of the car to another, unless it is apparent to the passenger that the movement would be attended with danger. *Prothero v. Railway Co.*, 134 Ind. 431, 33 N. E. Rep. 765 (1); *Railroad Co. v. Carper*, 112 Ind. 26 (2), 13 N. E. Rep. 122, and 14 N. E. Rep. 352; *Railroad Co. v. Kelly*, 92 Ind. 371. The fact that appellee responded to a general request, which appealed to him as directly as to anyone else in the car, should not deprive him of any right he would have had, growing out of a compliance with a request addressed to him individually. A further objection made to the complaint is that the request was unreasonable. The request to gentlemen to vacate seats occupied by them in a crowded public conveyance, in favor of ladies, who would otherwise stand, is not, in this country, so regarded.

Under the third specification of the assignment of errors, to wit, the overruling of appellant's motion for a new trial, appellant's counsel discuss together the first and second reasons respectively given for a new trial, viz., that the "verdict of the jury is not sustained by sufficient evidence," and "the verdict of the jury is contrary to law." We believe it would serve no good purpose to quote largely from the evidence, which is voluminous. We deem it sufficient to say, in passing upon these reasons for a new trial, that, while the testimony is conflicting, there is evidence which fairly tends to support the verdict on every material point. In view of the whole record, the objection urged, that there is a variance between the proof and the allegations of the complaint, is not well taken. It is only required that the evidence fairly tends to prove the substance of the issue tendered by the pleading, and this it does. Under the familiar rule of appellate courts, the judgment cannot, therefore, be disturbed.

Appellant next objects to instruction No. 8 given to the jury, upon the ground that there was no evidence to which it was applicable. Said instruction is as follows: "It is the duty of the passenger on the car to follow the reasonable instructions and directions of those in charge of the car, in regard to moving from one point of

1. *Prothero v. Citizens' Street R'y Co.*, 134 Ind. 431, is reported in 3 Am. Neg. Cas. 279.

2. *Cincinnati, H. & I. R. R. Co. v. Carper*, 112 Ind. 26, is reported in 3 Am. Neg. Cas. 186.

the car to another, unless it is apparent to the passenger, in exercising ordinary care, that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with its operations, and that they have a reasonable knowledge of what is safe and prudent for the passenger, in giving such instructions or directions. Therefore if in this case one of the servants of the defendant—the conductor in charge of the car—directed the plaintiff to stand on the platform, where he was standing when the accident occurred, it was the duty of the plaintiff to do so, unless it was known and apparent to him at the time that it would be unsafe for him, in the exercise of ordinary care and prudence, to leave the car and stand upon the platform; and if, while standing upon the platform, you find he was injured without any fault of his, but while standing there at the direction of the servant of the company, then, under these circumstances, even though you should find that his position was an unsafe one, yet this would not defeat plaintiff's right to recover, provided the danger was not apparent to him when he obeyed the instructions given, and took his position on the platform." One criticism made by appellant's learned counsel on this instruction is that "there was no evidence that the conductor in charge of appellant's car directed the plaintiff to stand on the platform." There was evidence that the conductor requested passengers to ride upon the platform. The conductor represents the company in the management of the car, so far as concerns the location of passengers. A request from one clothed with authority is practically equivalent to a direction. There is no substantial difference in the meaning of the words "request" and "direction," in the connection in which they are respectively employed in the complaint and instructions. But counsel contend that, if the request can be construed to be a direction to the plaintiff to stand on the platform, that it was error for the court to instruct that it was the duty of appellee to do so, as stated in the instruction. What we have heretofore stated, as to the sufficiency of the complaint upon the duty of the passenger to follow the reasonable directions of those in charge of the car, is applicable to this instruction.

Appellant's next objection is to instruction No. 11, which is to the effect that, even though the jury find from the evidence that the conductor did not direct appellee to stand upon the platform, that fact of itself would not necessarily defeat his right to recover in this action; the question still remaining for the jury to determine whether, under the circumstances, plaintiff was guilty of negligence in leaving the inside of the car and standing on the platform, in the absence of

any instructions from the conductor. Counsel contend that the complaint proceeds upon the theory that the actionable character of the negligence complained of, as to each of the facts, to wit, the collision, and the riding on the platform by appellee at the request of the conductor, is made by the complaint to depend to some extent on the existence of the other fact. It is not negligence *per se* for a passenger to ride upon a platform of a street car, going there directly from the street or from the inside of the car, as the authorities cited hold. The theory of the complaint is that appellee was injured by a collision of one car of appellant with another, caused by the negligence of appellant's servants. That was the cause of action, and it devolved upon appellee to prove only such facts alleged as amounted to a cause of action, and they need not be proved precisely as alleged. *Railway Co. v. Valirius*, 56 Ind. 517; *Insurance Co. v. Hinesley*, 75 Ind. 8; *Owen v. Phillips*, 73 Ind. 284; *Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. Rep. 128; *Railroad Co. v. McCorkle*, 140 Ind. 614, 40 N. E. Rep. 62.

The twelfth instruction, to which appellant objects, is as follows: "If you find from the evidence in the cause that the plaintiff was a passenger on one of defendant's cars, and was occupying a seat inside, in a safe place; and you further find that said car was crowded with passengers, and all the seats were taken, and that the plaintiff arose and vacated his seat to accommodate some lady passengers who had entered the car, and that, on account of the crowded condition of said car, instead of standing therein he voluntarily left it and passed out to the platform, and remained standing on the outside, where the accident occurred, — then as to whether or not in so conducting himself he was guilty of negligence is a question of fact, which I submit to you. If his conduct in this respect, in doing what he did under the circumstances, was the conduct of an ordinarily prudent and cautious man, then he was not guilty of negligence. If, on the other hand, in going out upon the platform, under the circumstances, he did that which a prudent and cautious person would and ought not to do, then he would be guilty of negligence." We think it fairly states the law applicable to the case.

The thirteenth instruction, also objected to, is to the effect that if the conductor on one of the cars of defendant was so drowsy and sleepy that he was unable to, and did not, give proper attention to the management of his car, and by reason thereof he carelessly and negligently permitted the car to run into and against the car upon which plaintiff was riding, thereby injuring him, the defendant was negligent, and plaintiff would be entitled to recover, provided all

other material elements of the complaint had been established. The objection made to this instruction is the statement that the mere fact that the conductor became drowsy and sleepy, so that he was unable to, and did not, give proper attention to the car, whereby plaintiff was injured, constituted actionable negligence. It is claimed that this statement is erroneous, without any statement as to whether his condition was caused by negligence, or whether his condition was known to appellant or any of its agents. This instruction is not unobjectionable, but, considered in connection with those given, we think it could not have misled the jury.

The reasons from twelve to twenty-two in the motion for a new trial question the rulings of the court in refusing to give to the jury instructions asked by appellant. The second instruction asked by appellant and refused by the court is as follows: "The plaintiff, in order to recover in this cause, must prove his case according to the allegations and theory of his complaint. His complaint proceeds upon the theory that he was instructed by the conductor to ride upon the platform, and that the conductor undertook to carry him safely while so riding. If he fails to sustain this theory, you should find for the defendant, provided you also find that he would not have been injured had he remained inside the car." In this we think there was no error. Appellee had the right to ride upon the platform without the request of the conductor. Appellee was not bound to prove the facts precisely as alleged. What we have said in reference to instruction eleven given by the court makes it unnecessary to say more upon this instruction.

The third, fourth, and fifth instructions refused are as follows: "Third. If the plaintiff left his seat inside the car, and voluntarily went on the platform, without the request of the defendant or its agent, the conductor, while there was ample standing room inside, then the plaintiff is presumed to have assumed increase of risk incident to riding on the platform instead of inside the car. And if you find such is the case, and if you further find plaintiff would not have been injured had he remained inside the car, you should find for the defendant. Fourth. Before the plaintiff can recover in this case, he must prove either that the car was so crowded that he could not conveniently sit or stand inside of the car, and went onto the platform on account thereof, or he must prove that he was asked or directed by the conductor to stand upon the platform. Fifth. A passenger who rides upon the rear platform of an electric street-railway car, when there is ample room inside of the car, in which there are pendant straps, to which a person may hold while standing, is guilty of contributory negligence; and if an injury result to him which

would not have occurred had he been inside the car, he cannot maintain an action against the carrier operating the car." These instructions were correctly refused. The court will not presume that it is dangerous to ride upon the rear platform of a street car, and it is not negligence *per se* to do so, with or without directions from the conductor.

The sixth and seventh instructions refused present the same legal question heretofore discussed, viz., that it devolved upon the plaintiff to prove his case by a preponderance of the evidence upon the theory of the complaint. They were properly refused. As above stated, it was not necessary for appellee to prove all the allegations of his complaint precisely as alleged.

The ninth instruction asked by appellant is that appellee could not recover for "fright, pain, or suffering, or for nervous shock, unless the same grow out of, or was connected with, bodily injury." The tenth instruction is to the same effect, except that it states that the appellee could not recover, unless the nervous shock, etc., was the result of, or connected with, the bodily injuries described in the complaint. The eleventh is that the plaintiff cannot recover at all, unless he received a bodily injury. The three instructions last named were asked and refused, but the court gave instruction No. 15, which is as follows: "The plaintiff can only recover, if at all, for the injuries described in the complaint, and cannot recover for other or different injuries; nor can he recover for fright or mental suffering or nervous shock, unless they grow out of, and were the result of, the personal injuries received, if you find he received any." The standard dictionaries define the word "bodily" to mean "pertaining to or concerning the body; of or belonging to the body or to the physical constitution; not mental, but corporeal," — and the word "personal" as pertaining to the person or bodily form. The expression "great personal injury" has been said to be equivalent to the expression "great bodily harm." 2 Abb. Law Dict. p. 273. A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. 2 Rap. & L. Law Dict. p. 955. If we admit, as claimed by appellant, that the terms "personal injuries" and "bodily injuries" are not "necessarily equivalent," yet the jury could only have understood from instruction fifteen given that the appellee was entitled to recover only for mental suffering growing out of the bodily injuries he received. The instructions, taken together, state the law applicable to the case; and, under the decisions of this state, even if, in some of them, when separately considered, there were inaccuracies of expression, the judgment should not on that account be reversed, if

as an entirety they are not calculated to mislead the jury. *Siebert v. State*, 95 Ind. 478; *McCarty v. Watterman*, 96 Ind. 596; *Gallaher v. State*, 101 Ind. 412; *Cline v. Lindsey*, 110 Ind. 343, 11 N. E. Rep. 441; *Deig v. Morehead*, 110 Ind. 461, 11 N. E. Rep. 458; *Railway Co. v. Watson*, 114 Ind. 22, 14 N. E. Rep. 721, and 15 N. E. Rep. 824; *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. Rep. 804; *Railway Co. v. Wright*, 115 Ind. 396, 16 N. E. Rep. 145, and 17 N. E. Rep. 584.

The remaining alleged error discussed is the permitting of appellee to read in evidence to the jury the deposition of one Buchanan. Prior to the trial, appellee had taken the deposition of Buchanan, in the State of Illinois. Buchanan, the witness, was present, and testified fully, at the trial of the cause. On cross-examination the witness was asked respecting the testimony given in the deposition, and for the purpose of impeachment, only, four questions and answers thereto were used in evidence by appellant to the jury, whereupon the court, over the objection of appellant, permitted appellee to introduce in evidence the whole of said deposition. Appellant's learned counsel admit that it would be competent to read such portions of the deposition as would tend to explain or qualify the portions introduced by appellant, but claim that it was not proper to permit appellee to have the benefit of a repetition of all the testimony of the witness. The ruling of the court is sustained by 3 Jones, Ev. sec. 703, and authorities there cited, and in *Harness v. State*, 57 Ind. 1; *Convers v. Meyer*, 14 Neb. 190, 15 N. W. Rep. 340; *Carey v. City of Richmond*, 92 Ind. 260.

We find no error for which the judgment should be reversed. Judgment affirmed.

WALKER V. GREEN.

Supreme Court, Kansas, March, 1899.

PASSENGER AND CARRIER — PASSENGER RIDING IN FREIGHT CAR INSTEAD OF CABOOSE AND INJURED. — A passenger on a freight train, who voluntarily and unnecessarily rides in a freight car containing a horse and household goods which he is shipping over the line of road, instead of riding in the caboose attached to the train, which is provided for the accommodation of passengers, and who is injured by the negligent handling of the car, will be deemed guilty of contributory negligence; and the permission of the trainmen to ride in the freight car will constitute no excuse for his act.

(Syllabus by the Court.)

ERROR from District Court, Sedgwick County.

Action by A. B. Green against Aldace F. Walker and others, receivers of the Atchison, Topeka and Santa Fe Railroad Company. Judgment for plaintiff, and defendants bring error.

A. A. HURD, O. J. WOOD, and W. LITTLEFIELD, for plaintiffs in error

HOLMES & HAYMAKER and ROHRBAUGH & RAUCH, for defendant in error.

DOSTER, Ch. J. — This was an action brought by A. B. Green against the receivers of the Atchison, Topeka and Santa Fe Railroad Company to recover damages for injuries received by him as a passenger on one of the company's trains prior to the appointment of the receivers. A phase of the controversy recently came before us in another action. *Walker v. Green* (Kan. Sup.) 55 Pac. Rep. 281. In that case it was held, construing the orders of the United States Circuit Court appointing and controlling the receivers, that they were liable notwithstanding the injuries were received previous to their appointment, and at a time when the company itself was in the operation of its line of road. The main case is now before us for consideration. The jury returned a verdict and special findings of fact in favor of the plaintiff, and upon which judgment was rendered for him. The findings, aided in some particulars by the evidence, to which we have referred for a fuller understanding of the case, show the following facts: Green shipped a car containing a horse and household goods over the line of the railroad from Kansas City, Mo., to Caldwell, this State. The car was loaded during the day, and the train started in the evening. A part of the agreement of shipment was as follows: "Release. In consideration of the free transportation granted me by the Atchison, Topeka and Santa Fe Railroad Company for the purpose of accompanying the stock shipped on the within contract, and of being permitted to go in, over, and about the cars in the train in which said stock is carried, and of being furnished return transportation free over said company's line to the point of shipment, as stipulated by the within company, we hereby release said company from all liability to us as to a passenger carried for compensation, assuming for ourselves all the risks of accident, injury, or damage from any cause whatever while upon the trains or premises of said company in charge of said stock, and while being returned free to the point of shipment as aforesaid (if entitled to return transportation free as per rules printed below). Signed this 30th day of October, 1893. A. B. Green. Fred C. Adams, Witness."

The train was an ordinary one, with a caboose or way car attached

for the convenience of the trainmen and passengers. Green did not ride in the caboose. He rode in the freight car, with his horse and household goods. He did so, as he said, in order to look after his property. Just before starting from Kansas City, he was seen in this car by the train conductor and station agent there, under circumstances reasonably indicating to them an intention on his part to ride in it. It was not unusual, though not the rule, for men shipping household goods to ride in the car with them. However, the trainmen on the train in question did not know that Green was in the car. He did not surrender or exhibit his pass or contract of shipment. The trip from Kansas City to Newton occupied about eighteen hours. Upon arriving at the latter place, the car containing the horse and goods was taken out of the train in which it had that far been brought, and was made up with other cars into a different train destined for Caldwell and other points south. In making up the new train in the yards at Newton, another car was bumped with considerable violence against the one containing Green and his property, so much so that the horse was thrown partly down, and some of the household goods moved or slid a foot or more along the car floor; and, upon arrival at Caldwell, a table and some kitchen utensils were found broken, supposedly as a result of the jar received by the bumping together of the cars at Newton. The car in which Green rode was a grain car, with side door constructed to slide upward a certain distance on iron rods. When raised to the proper height, the lower part of the door could be pulled inward, and raised up and fastened to the roof of the car by a hook. Before the loading of the car at Kansas City, this door had been raised, and the end of it hooked upward as just described. It was seen in that position by Green at the time of starting, although he did not specially inspect it to see how it was fastened. The mechanical device of raising, hooking up, and lowering the door was very simple. It could have been readily comprehended by Green, and he could have easily unhooked and lowered the door had he desired. He placed a wagon box in the center of the car between the two side doors. Inside this box he put a sleeping cot, upon which he slept during the night, and sat, if he so desired, during the day. This cot was immediately beneath the hooked-up and overhanging door before described. At Newton the train on which Green had ridden was turned over to the yard workmen there, the men who had brought it from Kansas City leaving it in their charge. There was no evidence that any of the workmen knew that Green was in the car. In making up the new train, the impact of the two cars mentioned caused the door to become

unfastened, and to fall, striking Green, and injuring him, to recover for which this action was brought. It cannot be maintained.

Freight cars are not designed for passenger travel; nor are they used for such, except as the exigencies of particular cases require. A railroad company discharges its full duty to the public when it provides trains composed of passenger coaches, and cabooses to its freight trains for the convenience of such passengers as have occasion to accompany their live stock or other property. It is not required, in the management of its freight trains, in making them up, in coupling its freight cars together, and in switching them about in its yards, to exercise that degree of care which is necessary in handling its passenger coaches and trains, for the obvious reason that no passengers are supposed to be in its freight cars. To hold railroad companies, as to passengers voluntarily and unnecessarily riding in their freight cars, to the same degree of care required of them as to passengers in their regular coaches or in their cabooses, would be preposterous. Carefulness is required of railroad companies, as of individuals, with relation only to that which may be injured or destroyed by the lack of it, and with relation to their knowledge of what has been committed to their care. With relation to passengers whom they have undertaken to transport, the highest degree of diligence which human skill and foresight can exercise is required of them. With relation to freight they have undertaken to transport, a less degree of care and prudence is exacted. For example, the receivers may be liable for the negligent handling of the cars in the yards at Newton, which resulted in damage to the goods of the defendant in error; but they are not liable to him for the injuries he received, because he voluntarily exposed himself to the hazards of riding in a freight car. It is no sufficient answer to say that the trainmen knew the defendant in error was in the freight car. In all probability, they were unaware that he was in fact in it; nor were they bound by the usual course of their duty or their observation to know that he or other passengers would be liable to ride in such unusual place, but, had they known him to be in the car, the case would be nowise different. The increased dangers of riding in such car were as well known to him as to the trainmen; and their knowledge that he was exposing himself to the increased perils of such kind of passage, or their permission to him to do so, constitutes no justification for his act. He was of mature years and discretion, and needed no one to warn him against the hazards he was taking. He, as well as they, was charged with notice that freight cars are not fit and safe vehicles for travel. The principles applicable to this case have been heretofore declared by this court

in *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. Rep. 703. In that case it appeared that a live-stock shipper was directed by the conductor to go upon the top of the train hauling his stock, so as to assist in watering it. He did so, and was injured by the negligent act of the engineer in violently bumping together detached portions of the train. It was ruled that riding upon the tops of the cars was negligence upon his part, and also that the direction or request of the train conductor to do so constituted no excuse for his assumption of the risk. In the opinion by Chief Justice Horton, many of the cases elucidating the rules in question are cited and quoted from. No cases involving a state of facts entirely like those under consideration have been called to our attention, but many of an analogous character are cited in Ray, Neg. Imp. Dut. sec. 123. The rule collectible out of these cases fully supports the decision made in this case and in that of *Lindley*, *supra*.

It is true that the portion of the written contract of shipment made by the defendant in error recites that he was "permitted to go on, over, and about the cars in the train in which said stock is carried." This, however, was not a permission to ride throughout the entire journey on other parts of the train than the caboose; but it was, as the language reads, a permission to go on, over and about the train, and was, of course, designed to enable him to make such inspection *en route* of his horse and other property, as might be thought necessary to properly care for it. There was no occasion for him to ride continually in the car with his horse and household goods in order to care for them, nor does the contract of shipment presuppose a necessity for doing so, and therefore confer upon him a corresponding right. The demurrer to the evidence of the defendant in error (plaintiff below) should have been sustained; so, likewise, judgment should have been rendered against him on the special findings of the jury.

The judgment of the court below is reversed, with directions that these be done. All concur.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. HENRY.

Supreme Court, Kansas, March, 1899.

HARVESTING MACHINE STUCK UPON TRACK AT CROSSING AND DRIVER KILLED IN COLLISION WITH TRAIN. — Railroad companies must know the requirements of harvesting machines in general use throughout the state, as to the width of highway crossings necessary to enable persons to drive them safely over, and a failure to provide suitable crossings for such machines, whereby injury occurs, is negligence.

SMITH, J., dissenting.

(Syllabus by the Court.)

FROM a judgment of District Court, Osage County, in favor of plaintiff, defendant brings error.

A. A. HURD, O. J. WOOD and W. LITTLEFIELD, for plaintiff in error.

WATERS & WATERS, for defendant in error.

DOSTER, Ch. J. — This was an action for damages brought by Allie May Henry, widow of Frank B. Henry, against the Atchison, Topeka and Santa Fe Railroad Company, for negligently causing his death by its failure to maintain a highway crossing suitable for the passing of a harvesting machine over it, whereby the machine became stuck upon the track, and the engine and train collided with it. The case has been to this court before. *Railroad Co. v. Henry*, 57 Kan. 154, 45 Pac. Rep. 576. The substantial facts are stated in the report of the former decision. The case was reversed because of misdirection of the jury. Upon the second trial the plaintiff again recovered a verdict and judgment, from which error has been prosecuted to this court. The alleged defects in the highway crossing were insufficiency of width to accommodate the harvesting machine, and the failure to lay the planks composing it to correspond with the angle made by the railroad and the highway. The railroad company's defense to the action was that the crossing maintained by it was at a proper angle and of sufficient width to accommodate all the ordinary travel over it; that the harvesting machine was of an unusual width; and that it had no knowledge that a machine of such width and requiring such highway accommodations was in use. The jury made special findings of fact. Those material to be adverted to are as follows: "Q. 2. Did Edmund Stredder know the condition of the crossing in question at the time he attempted to cross over it with the binding machine on the day of

the accident? A. Yes. Q. 3. Could Edmund Stredder have passed over the crossing in safety, had not one of his horses shied and crowded the other, so as to cause the wheel at the end of the sickle bar to run off at the end of the plank crossing and catch on the rail of the track? A. No. Q. 4. Did Edmund Stredder, before attempting to pass over the crossing with his binder, know what the width of the crossing was, and believe it was of sufficient width to admit of the binding machine passing over it? A. He believed it was sufficient width. Q. 5. Was there a plank crossing of the railroad track at the place where Edmund Stredder attempted to cross with his binding machine on the day of the accident? A. Yes. Q. 6. If you answer the last question in the affirmative, then state how many planks there were between the rails, and how many on the outside of each rail. A. Four between and one on outside of each rail. Q. 7. If you answer that there was a plank crossing at that place, then state the length of the planks at that crossing. A. Fourteen feet. Q. 8. If you answer that there was a plank crossing at the point in question, then state the thickness and width of the planks. A. Two and one-half inches thick by eleven inches wide. Q. 9. If you answer that the space between the rails at the crossing was not all planked, then state what part or portion of it was not planked. A. None, except room for flanges on wheels. Q. 10. If you answer that there were planks at the outside of each rail of the crossing in question, then state the width and thickness of such planks. A. Two and one-half inches thick by eleven and one-half inches wide. Q. 11. How many horses did Edmund Stredder have drawing the binder at the time he attempted to pass over the crossing in question? A. Three. Q. 12. Of what make or manufacture was the binding machine in question? A. Deering binder, seven feet cut. Q. 13. How many wheels were there that carried the binder or on which it ran? A. Two. Q. 14. What was the distance from the outside of the main or drive wheel and the outside of the small wheel that carried the sickle? A. Ten feet and four inches. Q. 15. Could the binding machine in question have been taken over the crossing where the accident occurred, with safety, if drawn by two horses, and with the exercise of ordinary care and prudence on the part of the driver? A. No. Q. 16. If you answer 15 in the negative, then state why it could not. A. The surface on the approach was too narrow. Q. 17. Could the binder in question have been driven over the crossing in question, if drawn by three horses abreast, without getting caught or stuck upon the rail, if the outside horses had traveled outside of the planks and between the ties? A. No. Q. 18. Was there anything to prevent

a horse from walking over the track outside of the planks at the crossing in question? A. Yes. Q. 19. If you answer the last question in the affirmative, then state what there was to prevent a horse crossing the track at the end and off the planking. A. The ties and rails. Q. 20. Did the outside horse called 'Old Bony' crowd the other horses so as to cause the small wheel carrying the sickle bar to run off the planking and get caught upon the rails of the track? A. Yes. Q. 21. When Edmund Stredder drove upon the crossing just before the accident, with the machine in question, did both the drive wheel and the small wheel carrying the sickle bar run upon the planking of the crossing? A. No." "Q. 46. Had Edmund Stredder, whose binder was stuck on the crossing, the day before that crossed the same kind of a crossing on defendant's track, with the same machine, without any difficulty or trouble? A. Similar crossing. Q. 47. What was there to prevent Edmund Stredder from leading the third horse so as to have his machine pulled by the team only over the crossing, outside of the extra trouble or care? A. Inconvenience. Q. 48. At the time of the accident in question could Edmund Stredder have crossed over this crossing with the machine with a team of two horses easily, and without any trouble or danger of getting off from the crossing? A. No. Q. 49. If you answer the last question in the negative, then state why he could not have driven it over the crossing with a team of two horses, in safety, at that time. A. The approach was too narrow. Q. 50. Could the binder in question have gone over the crossing so as to have left a foot and a half from the outside of its wheels on each side of the ends of the plank on each side? A. No. Q. 51. If you answer the last question in the negative, then state how much room would have been left on the outside of each of the wheels on the plank crossing. A. One inch on each end. Q. 52. At what angle did the railroad cross the alleged public road at the time of its construction? A. Seventy degrees and twenty-eight min." "Q. 54. Did the traveled track of the road, both north and south of this crossing, make a bend so as to make the crossing at more nearly a right angle? A. No evidence to show that it did at this particular time." "Q. 77. Do you find from the evidence that Edmund Stredder had as much knowledge of the character and condition of the crossing where this accident occurred, and of the Deering binder, and of the breadth of crossing required by it, when pulled by three horses, as the defendant company had, before the time that he attempted to drive over the crossing with the machine so pulled by three horses? A. Yes. Q. 78. Did Edmund Stredder, before he got upon the crossing, believe that he could drive over it, with the

machine pulled by three horses, with safety, without the machine getting caught or stuck upon the crossing? A. Yes. Q. 79. Were the opportunities of Edmund Stredder for knowing the condition of the crossing, as to being safe over which to drive a machine of this character pulled by three horses, as good or better than those of the railroad company? A. It was as good. Q. 80. Do you find from the evidence that Deering binders, like the one with which the train collided, were in general use in the vicinity of the crossing in question prior to that time? A. No." " Q. 82. Had Edmund Stredder been acquainted with the crossing where this casualty occurred ever since the railroad was constructed over that highway? A. Yes. Q. 83. Do you find from the evidence that Deering binders, of the size of the one with which the train in question collided, had ever been transported over this railroad crossing or upon this highway, pulled by three horses, prior to the date of the derailment of the train? A. No. Q. 84. Do you find from the evidence in this case that Deering binders, of the size and description of the one with which this train collided, had been transported over the crossing in question, along that highway, prior to the date of the collision and derailment of the train? A. No " " Q. 86. Does a Deering binder of the size and description of the one in question require a greater width of crossing when drawn by three horses than when drawn by two? A. Yes. Q. 87. Do you find that railroad company had knowledge that Deering binders of the size and description of the one with which the train collided were transported over and along the highway in question prior to the date of the derailment of the train? A. No." " Q. 89. Do you find from the evidence that Edmund Stredder was the first person that ever attempted to pass over the crossing with a Deering binder drawn by three horses? A. Yes. Q. 90. Did Edmund Stredder, prior to the time his binder became stuck on the crossing in question, know or have reason to believe that Deering binders, such as the one in question, could not be safely taken over this crossing, when drawn by three horses, without being caught or stuck upon the railroad track? A. No."

There is nothing in these findings which acquits the plaintiff in error of the charge of negligent maintenance of the crossing. It is true that Deering binders, of the size and description of the one in question in this case, had never been transported over this particular crossing prior to the time of the accident; and it is also true that the evidence did not show that Deering binders like this particular one were in general use in the vicinity where the accident occurred. The jury, however, do not find that binders other than those of the Deering make, and of a size and description like those of the Deering,

were not in general use in that vicinity, or had not been transported over that particular crossing. It is also true that Stredder, the driver of the binder, had as much knowledge as the railroad company of the width and other conditions of the crossing, and that he had driven the machine over a similar crossing the day before. None of these matters, however, are of avail to excuse the railroad company. The statute requires railroad companies to maintain highway crossings at least twelve feet wide. That is the minimum; but, if the necessities of public travel require them of greater width, railroad companies must take notice of the fact, and establish them accordingly. Kansas is a wheat-growing State, and binders and harvesting machines of all kinds are in common use throughout its limits. Railroad companies must know the requirements of harvesting machines at highway crossings, and they cannot be excused from the obligation to maintain crossings of a width sufficient to accommodate the machines in general use in the State, upon the ground that they did not know that one of more than ordinary width had been introduced in a particular community, and was liable to be driven over the crossings there. While they may not be required to take immediate notice of recent and extraordinary enlargements of the size of harvesting machines, as soon as the inventions are put upon the market, and immediately improve their highway crossings to accommodate such new inventions, they nevertheless are chargeable with knowledge of the requirements of such machines as are in general use in the agricultural States through which they pass. There is, as before remarked, nothing in the findings to indicate that machines of the size of the Deering binder in question were not in general use in the vicinity where the accident occurred. In fact, there is nothing in the findings to indicate, to persons without special knowledge upon such matters, that the machine in question was one of more than usual size or width. Its width is stated, but we do not judicially know from that whether it was wider or narrower than the average. We infer, however, from the arguments of counsel, that it was wider, and have viewed the case accordingly. Passing beyond the findings of the jury to the evidence in the case, it appeared in testimony that the accident in question occurred in Ellsworth county, and that that county is in the wheat belt of the State, — a region where wheat growing is more general than in other parts, and that Deering machines of the size and kind in question were, and for ten or twelve years had been, in common use in that part of the State. While no specific findings were made that Ellsworth county is in the wheat belt, and that the machine in question was in general use in the wheat belt, these matters, so far as

essential to the plaintiff's recovery, are included in the general verdict, and operate as much in plaintiff's favor as though they had been specifically found. It matters not that Stredder had as much knowledge as the railroad company of the suitability of the crossing for the purpose of driving harvesting machines over it. The case is not determinable upon the strength of what Stredder knew or did not know, nor upon presumptions as to what the railroad company in fact knew, but upon what it, as a matter of general knowledge, was required to know.

Some exceptions were taken to the reception of evidence in behalf of the defendant in error, and some objections were made to instructions given to the jury. We have examined these claims of error. They are unfounded. The judgment of the court below is affirmed.

JOHNSTON, J., concurred.

SMITH, J. (dissenting). — I cannot agree with the majority of the court. Liability of the railroad company for the death of Frank B. Henry is made to depend upon a conclusive presumption fixed upon it, of which no contradiction is permitted, to the effect that it had knowledge, or ought to have known, that Deering harvesters of unusual width were in use in the wheat belt of Kansas. This, in my judgment, is not one of the cases where the rights of a party should be dependent upon the doctrine of constructive knowledge. Such considerations rightfully enter into a case involving a claim of immunity from punishment, based upon ignorance by a violator of the law, where public policy demands that no one should plead lack of knowledge as an excuse for its infraction. Here, however, the matter is decided by interposing a positive obligation to know a thing, by which all inquiry is stifled, and complete information conclusively imputed to a party of a mere fact in the case; the real truth, as disclosed by the evidence, being otherwise. The railroad company more than satisfied the minimum obligation resting upon it when it constructed a crossing fourteen feet wide. When this case was here before (57 Kan. 154, 45 Pac. Rep. 576), Chief Justice Martin said: "The evidence does not show whether the machine in question was of unusual width or not, and if its width was exceptional, and it was an uncommon occurrence for a vehicle or machine to require so much breadth of crossing for its accommodation when drawn in the usual manner, it would be unfair to charge the railroad company with notice that a crossing of greater width was necessary."

The following is a summary of the facts found by the jury: That Deering binders, the size of this one, had never been transported over the railroad crossing or upon this highway, pulled by three horses, prior to the derailment of the train; that Stredder, the

owner of the machine, had as much knowledge of the character and condition of the crossing where the accident occurred, and of the Deering binder, and of the breadth of the crossing required by it, when pulled by three horses, as the railroad company had before the time he attempted to drive over the crossing; that he (Stredder), on the day before the accident, crossed the same kind of a crossing over the railroad track, with the same machine, without any difficulty or trouble; that the evidence did not show that binders like the one with which the train collided were in general use in the vicinity of the crossing in question prior to the time of the accident; that the railroad company had no knowledge that Deering binders, of the size and description of the one with which the train collided, were transported over and along the highway in question prior to the date of the accident; that Stredder was the first person who ever attempted to pass over the crossing in question with the Deering binder drawn by three horses. Again, the jury was asked and made answer to this question: "Q. 90. Did Edmund Stredder, prior to the time this binder became stuck on the crossing in question, know, or have reason to believe, that Deering binders, such as the one in question, could not be safely taken over this crossing, when drawn by three horses, without being caught or stuck upon the railroad track? A. No." If Stredder, who owned, used, and operated the machine, did not know, or have reason to believe, that a Deering binder, like the one in question, could not be safely taken over this crossing when drawn by three horses, how could the railroad company be expected to know? If the railroad company must know of the progress made in the manufacture and use of improved farm machinery, by which the width of harvesting machines was increased, thus demanding a corresponding increase in the width of road crossings, it is charged with a greater knowledge on the subject than the farmer had whose duties required him to use and operate said machine and haul it from one place to another. While the railroad company may often transport such harvesters, and its employees may see them in the fields adjacent to the track, yet their knowledge of their width and practical working must be exceedingly limited, compared with the information gained by a farmer who daily cuts his grain with this implement during the harvest season. The railroad company and its employees were in a state of ignorance as to the width of crossing demanded by such a machine, unless such knowledge could be imputed to them from the fact that such implements were in general use in the wheat belt. No claim is made that the company had actual knowledge that a wider crossing was necessary, but it is said that it ought to have had, from the fact that

the crossing in question was in what is known as the "wheat belt of Kansas." One or two traveling men testified that the machines were in general use in that section, and required a crossing of eighteen or twenty feet wide to let them over a railroad track. If such knowledge is to be presumed on the part of the railroad, it must, by the same reasoning, be presumed on the part of the farmer. Yet the jury found that Stredder thought the crossing was sufficient to take the harvester safely over, and he was possessed of actual and practical knowledge of its workings, and owned large wheat fields, of over 200 acres. The company must have had knowledge of the increased width of such machines before it would be required to widen its crossings. The jury found that Stredder had as much knowledge of the character and condition of the crossing as the railroad company had, and of the Deering binder, and of the breadth of crossing required by it when pulled by three horses. If, then, their knowledge was equal, the railroad could have had no notice or intimation that the crossing was unsafe for the passage of the machine, for Stredder had none. If the actual users of these machines were ignorant of the fact that a crossing more than fourteen feet wide was demanded to permit their safe moving from one side of a railroad to another, to whom else could the railroad company go for better information on this subject, if it started upon an inquiry? Certainly the traveling salesmen were not higher authority. Besides, the jury found that Deering binders like this were not in general use in the vicinity of the crossing in question prior to the time of the accident. This finding is at variance with the testimony given by the traveling men. The established facts in this case ought not to be smothered under contrary presumptions.

LOUISVILLE AND NASHVILLE RAILWAY COMPANY v. COOLEY'S ADM'R.

Court of Appeals, Kentucky, February, 1899.

MASTER AND SERVANT — BRAKEMAN ON TOP OF CAR KILLED BY STRIKING AGAINST TOP OF BRIDGE. — A railroad company is guilty of negligence in maintaining an overhead bridge so low that a brakeman while standing on top of a car cannot pass under in safety.

SAME — CONTRIBUTORY NEGLIGENCE. — Although a brakeman may have known of the danger of standing on top of a car while it was passing under an overhead bridge, he was not necessarily chargeable with contributory negligence in so standing, as in the discharge of his duties he might have forgotten the danger that threatened him.

APPEAL from judgment, Circuit Court, Lincoln County, in favor of plaintiff.

J. W. ALCORN and BRECKENRIDGE & SHELBY, for appellant.

ROBT. HARDING, HARVEY HELM and W. G. WELCH, for appellee.

PAYNTER, J. — The appellee's intestate was a brakeman on the appellant's freight train, and while sitting on the rear box car, as claimed by the appellee, his head came in contact with the timbers of a bridge, and he was instantly killed. Without going into a discussion of the question, it is sufficient to say that it was negligence on the part of the company to have a bridge constructed as was this one. It was a constant peril to the lives of its employees whose duties called them on top of trains. When a brakeman's life is lost in consequence of such negligence, the company cannot excuse itself by simply showing that he knew, before receiving the injury, the bridge was so low that he could not pass over it with safety while standing on top of the cars. Exigencies or other causes may arise in the discharge of his duties which may cause him to forget the danger with which he is threatened, and thus cause his failure to avoid injury. Cooley was killed on the first day he served as brakeman on the road, between Paris and Maysville; and while the appellant endeavored to show that he had knowledge of the location of the bridge, and the danger attending passing over it, there is no evidence that he knew the exact distance from the top of the car to the overhead timbers. If he failed to measure the exact distance between the top of the car and bridge with his eye, or did so, but failed, after reasonable effort, to get his body in an exact position to avoid a collision with the bridge, it seems to us that the appellant should suffer the loss, and not the intestate's estate.

It is claimed by appellee that Cooley was sitting on the rear end of, and on top of, a box car, with his back to the bridge, when he was struck on the back of the head by it, and killed. The appellant endeavors to show that, just before getting to the bridge, he stood up on the car, and as he was being pulled down by a brakeman to save him from the injury, the accident took place. There is evidence of persons who worked on the road tending to show that it was not safe for a brakeman to pass over the bridge on a box car while sitting on it, with his feet hanging over its sides, and that it was necessary to lie down on top of the car to avoid injury from the bridge. There is no evidence in this case to show the height of the car upon which Cooley was killed; but Anderson, master of trains on appellant's road, and a witness for the appellant, said the height of an ordinary box car varies from twelve feet five inches to about thirteen feet ten inches. The distance from the top of the rail to

the overhead timbers of the bridge is sixteen feet and one inch. A simple calculation shows that it was dangerous for a man of Cooley's height (six feet one inch), to even pass over the bridge while sitting on the end of some of the box cars in use on the appellant's road; and, in view of the character of his injury and other facts developed in the record, a fair-minded jury might have given but little weight to the evidence of the rear brakeman. The facts in this case are not exactly as those in the Sampson Case, 97 Ky. 65, 30 S. W. Rep. 12. In fact, we rarely find two cases where the facts are exactly similar; but the doctrine enunciated in the Sampson Case is equally applicable to this case, and therefore we think the court properly instructed the jury. We are of the opinion the court was authorized, from the evidence in the case, to submit the questions of fact to the jury; and, indeed, we are not prepared to say the jury was not authorized by the evidence to return the verdict which it did.

The accident occurred in Bourbon county, and the residence of the intestate was in Lincoln county, where the personal representative qualified; and we are of the opinion that the Circuit Court of the latter county had jurisdiction of the action. *Sherrill v. Railway Co.*, 89 Ky. 302, 12 S. W. Rep. 465; *Harper v. Railroad Co.*, 90 Ky. 359, 14 S. W. Rep. 346; *Railroad Co. v. Heath's Adm'r*, 87 Ky. 655, 9 S. W. Rep. 832. The action was properly brought in Lincoln county, under section 73, Civ. Code Prac., as was determined in the cases cited.

The judgment is affirmed.

BOUCK V. JACKSON SAWMILL COMPANY.

Court of Appeals, Kentucky, February, 1899.

MASTER AND SERVANT—MACHINERY—WHEEL IN SAW MILL PULLED FROM FASTENINGS AND STRIKING EMPLOYEE.—The question of the master's negligence was for the jury where it was shown that a wire rope attached to the end of a log carriage by means of a wheel was drawn so tight on the morning of the injury by direction of the foreman that it pulled loose from its fastenings, and hurled the wheel to the lower floor of the sawmill where it struck and injured the plaintiff.

APPEAL from judgment, Circuit Court, Breathitt County, in favor of defendant.

J. J. C. BACH, G. W. FLEXNOR and W. W. VAUGHN, for appellant.
BECKNER & JOUETT, for appellee.

HAZELRIGG, Ch. J. — The appellant instituted this action in the Breathitt Circuit Court against appellee, the Jackson Sawmill Company, seeking to recover damages for wrongful injury inflicted upon him through the alleged negligence and carelessness of the appellee company, its agents and servants. The pertinent allegations of the appellant's petition disclose that he was employed by the appellee company as an engineer in its saw-mill, and was so acting in that capacity, and in the discharge of his duties, at the time of the injury complained of; that his work and duties were confined to looking after the engines and boilers situated on the lower floor of the mill building. The appellant further alleges that in the second story of the building is located the saw, saw rig, log carriage, and other machinery used by the appellee company in operating its mill; that saw logs are placed upon the log carriage, where they are shifted to and from the saw, in making them up into lumber. It appears that the log carriage is propelled backward and forward by means of steam from the engines on the lower floor, and that to the engine is attached a large drum wheel, to which are fastened two wire ropes, one of the ropes running up and being fastened to the front end, and the other to the back end, of the log carriage in the second story; that to the engine furnishing steam to propel this log carriage is also attached a lever which reaches to the second story, and by this lever a servant of the company, commonly called the "sawyer," lets the steam on or off, by which means the log carriage is propelled forward or backward, at will of the sawyer. The petition and amended petition further disclose that the wire rope attached to the front end of the log carriage is fastened to the same by means of a wheel called a "ratchet," and upon this ratchet are a number of cogs, which, in connection with a small dog or catch, hold the rope in position after the same has been attached to the ratchet. It is alleged that one Keene, foreman of the mill, on the morning of the injury, and just before it happened, caused the wire rope to be drawn so tight, when wound upon the ratchet, that it pulled loose from its fastening, causing the dog to cut one of the cogs off smoothly, and breaking other cogs in the ratchet wheel, and it was hurled with great force to the lower floor, where it struck the appellant, and caused the alleged injuries complained of. The appellant alleged in an amended petition that the injury was caused from the fact that the appellee company, through its agents, had drawn the rope too tight for it to perform its proper functions, or else the ratchet upon which the rope was fastened was insufficient for the purpose for which it was being used; but of these causes appellant says he does not know which is true. The appellee filed

an answer, denying the allegations of this petition, and setting up a plea of contributory negligence on the part of appellant. Upon the issues thus made, the appellant introduced some two or three witnesses, and closed his case. Thereupon the court, on motion, gave peremptory instruction to find for the company, and verdict and judgment were accordingly rendered.

The only question presented for our decision is whether or not plaintiff introduced sufficient evidence sustaining allegations of his petition and amended petition to authorize the court to submit question of negligence to the jury. The only evidence tending to show that the appellee company was negligent and careless in such a way as to cause the injury complained of was given by the appellant and a witness Vaughn, who was the sawyer; and they prove that, previous to the accident complained of, the company had been using a hemp rope attached to the front end of the log carriage, and that the wire rope was much heavier. The appellant proves that, to his best recollection, this new rope was brought into use only on the morning of the injury, and the company had never before used a wire rope on this log carriage. The witness Vaughn says: "The rope that was on the carriage that morning was a new wire rope; but I am of the opinion that it had been on there for a few days before the morning it pulled loose and struck Bouck. The ratchet wheel was held in its place by a dog, and, when the rope pulled loose, it cut the cog smooth off that the dog was against, and broke the second cog off, and knocked the corner off of the third. I don't know whether this rope was too tight or not. It had never broke the wheel before. The rope had a strength of 11,000 pounds, and we had drawn it more tightly and fastened it on that morning, before I started the engine. Mr. Keene was present on that morning when the rope was fastened, and, as I now recollect, he called some more of the hands to help, but I don't remember that he helped to fasten it himself." From this evidence the jury might have reasonably inferred that, but for the fact that the rope was drawn more tightly on that morning than usual, it would not have broken the cogs or torn loose from its fastenings; and, if this is true, the company's foreman being present, and directing how the rope should be drawn and fastened, it would make the company liable for injuries to the appellant whose duties were confined to the lower floor, and who knew nothing of what was going on above him, nor was it his duty to know. Or the jury might have concluded that the rope was fastened too tight, and thus was prevented from performing properly its functions. While there is but little evidence to sustain appellant's complaint, still, under the rule as announced by this

court, we think there is sufficient evidence to authorize the question of negligence to go to the jury, under proper instructions. *Fugate v. City of Somerset*, 29 S. W. Rep. 970.

The judgment is reversed for proceedings consistent with this opinion.

PEASE V. INHABITANTS OF PARSONSFIELD.

Supreme Judicial Court, Maine, January, 1899.

DEFECTIVE HIGHWAY — NOTICE TO HIGHWAY SURVEYOR. — Notice to a highway surveyor *de facto* acting under color of authority is just as binding upon the town as though he was an officer *de jure* and it is liable for his acts.

SAME — RIDGE OF ICE IN ROADWAY. — Actual notice to such officer twenty-four hours before the injury is sufficient to charge the town with knowledge of a defective highway and render it liable for injuries to a horse that slipped and fell upon a ridge of ice.

FROM a verdict in favor of plaintiff, rendered in Supreme Judicial Court, York County, defendant brings exceptions.

This was an action in which the plaintiff sought to recover of the defendant town damages for an injury to his horse, received on the 30th day of January, 1896, while he was driving the same upon a highway in the said town.

The injury was inflicted by a defect in the highway, and consisted of a ridge or hummock of ice, with a broken and uneven surface, extending across the traveled part of the road. The jury returned a verdict for the plaintiff of \$144.97.

Upon the proposition that the municipal officers or highway surveyor of the district had had at least twenty-four hours' actual notice of the defect causing the injury, the following admissions were made in court by the defendant: "It is admitted upon behalf of the defendants that George P. Davis was at the time one of the selectmen of the town of Parsonsfield, and that on or about May, 1895, the selectmen of the town placed in his (Merrill's) hands the surveyor's book for the district in which this road was located, and that the book contained the written appointment of Merrill as surveyor of that district, and signed by a majority of the selectmen. It is also admitted that George P. Davis, P. W. Benton, and Brackett T. Lord were selectmen of the town at this time." The plaintiff introduced evidence showing that the highway surveyor's book remained in Merrill's possession until after the injury complained of, and until the taxes

therein contained were worked out under his supervision; also, that Merrill had actual, personal knowledge of the defect complained of at least twenty-four hours before the injury occurred, and in fact for several days, and had done some work in attempting to remedy the defect; also, that complaints had also been made to him relative to this identical piece of road some days prior to the injury; also, that George P. Davis, one of the municipal officers, had knowledge of the defective condition of the road at that point; also, that Peleg W. Benton, one of the selectmen of said town, knew and appreciated the dangerous character of this piece of road, as shown by a witness (Roberts), who quoted Mr. Benton as saying a few days prior to the injury complained of: "There is the worst piece of ice I ever saw, on Merrill hill, near Liston Merrill's; and I shall break my devilish neck if I don't get there before the moon goes down." Mrs. Pease, wife of the plaintiff, testified to this same conversation, and it was not denied by Mr. Benton.

Mr. Merrill had not taken his official oath, and the presiding justice instructed the jury that actual notice to Merrill, under the facts disclosed and admitted, would be a sufficient compliance with the statute, and the defendants excepted to that instruction.

The defendants also filed a general motion for a new trial.

J. O. BRADBURY and J. MERRILL LORD, for plaintiff.

B. F. HAMILTON and B. F. CLEAVES, for defendants.

HASKELL, J. — Case to recover damages for injuries to a traveler's horse, suffered from a defective highway. Verdict for plaintiff for \$144.97. The defendants have an exception to the instruction of the presiding justice, upon evidence that made the same pertinent: That if the municipal officers of defendant town, or a majority of them, gave a written appointment to one Merrill, signed by a majority of them, as highway surveyor for the road district where the injury was received, and he took the surveyor's book, and performed the duties of surveyor, and caused the taxes to be worked out, during the season of 1895, and until after the accident occurred, he would be a highway surveyor *de facto*, within that district, and that twenty-four hours' actual notice to him prior to the injury would bind the town.

This instruction was well enough, for Merrill, apparently clothed with authority, performed the functions of the office, and the fact that he had not been sworn could make no difference. He was an officer *de facto* — that is, acting under color of authority; and, so far as the public or third persons are interested, his acts were just as valid and binding as if he had been an officer *de jure*. Town of Plymouth *v.* Painter, 17 Conn. 585, and cases cited; Smith *v.* State,

19 Conn. 493. In *Woodbury v. Inhabitants of Knox*, 74 Me. 462, a school agent, chosen at a meeting that had not been duly notified, and not sworn, employed a teacher; and it was held that his act was binding upon the town. See, also, *Brown v. Lunt*, 37 Me. 423; *Inhabitants of Belfast v. Inhabitants of Morrill*, 65 Me. 580. In *Woods v. Inhabitants of Bristol*, 84 Me. 358, 24 Atl. Rep. 865, there was an attempt to usurp an office, not to fill one under color of right. *Bunker v. Inhabitants of Gouldsboro*, 81 Me. 188, 16 Atl. Rep. 543, is not in point.

The jury found a verdict for the plaintiff. It was none too large. The issues of fact were stoutly contested. A careful reading of the evidence does not show that the verdict is wrong. Difference of opinion may well exist as to its correctness. It is a verdict of the jury, and commands our respect. We are not disposed to overturn it.

Motion and exceptions overruled.

ADAMS V. SWIFT ET AL.

Supreme Judicial Court, Massachusetts, March, 1899.

HIGHWAYS — COLLISION — CARRIAGE OVERTAKING ANOTHER AND POLE STRIKING PERSON IN FRONT CARRIAGE. — A finding that the excursion was a joint undertaking, and the mother was liable for the injury from a collision of vehicles was justified where the evidence showed that she and her minor daughter accepted an invitation for a drive, the daughter unconditionally but the mother on condition that she be allowed to pay half the expense; that the daughter was driving at the time of the collision; and when a bystander asked what they were trying to do, she replied that she could not hold the horses, and the mother said the daughter was all right, and afterwards the mother requested another occupant of the carriage not to speak of the collision and to let the injured persons find out as best they could the identity of their party.

SAME. — Whether the cause of the collision was the sudden slowing down of the carriage in which were the injured persons as it reached level ground after coming down an inclined road upon which the defendant's carriage was following and overtook the other, was for the jury.

EXCEPTIONS from Superior Court, Bristol County.

Action by Annie E. Adams against Caroline F. Swift and another for personal injuries from a collision between the carriages in which the respective parties were driving on the 15th day of August, 1894, on a road leading from New London to Sunapee, in the State of New Hampshire. There was testimony tending to show that defendant Helen L. Swift, a minor, nineteen years of age, was stopping with

her mother at an hotel in said Sunapee, and that the father was then at his home, in New Bedford; that the defendants and a Mrs. Page, of Norfolk, Va., were invited by a Mr. Borden to drive with him from Sunapee to New London on said date, to witness a coaching parade; and that defendant Helen L. Swift accepted unconditionally, and the defendant Caroline F. Swift upon condition that she should be permitted to reimburse Mr. Borden for one-half the cost of the carriage, and that Mrs. Swift testified upon this point, "I do not know what was paid for the hire of the team, but only know that my daughter and I were invited to go by Mr. Borden, and I told him I would accept his invitation provided he would let me pay one-half of it, and, after some discussion with Mr. Borden, he finally consented, and I paid him \$2.50;" that defendant Helen L. Swift drove the team from Sunapee up to and at the time of the collision; that, upon the return from New London to Sunapee, the plaintiff was driving in a buggy with her husband directly in front of the carriage occupied by the defendants, which latter was a two-seated surrey, drawn by two spirited horses, driven by the defendant Helen L. Swift, Mr. Borden and Miss Swift being upon the front seat, and Mrs. Swift and Mrs. Page upon the back seat; that the carriages of plaintiff and defendants formed part of a procession on the road of seventy-five or one hundred carriages returning home, being in line close together, except that the actual distance between defendants' carriage and that next in rear did not appear, and that they maintained their relative positions substantially in the line until the accident complained of; that, just prior to the accident, the attention of the plaintiff and her husband was drawn to the carriage in which the defendants were driving, at which time the carriage in which were the defendants was coming down the end of an incline in the road to a level stretch upon which the plaintiff's buggy had just entered; that all the carriages came down said incline upon a slow trot, and that, just as the plaintiff's buggy entered upon the level, the end of the pole of the carriage in which the defendants were driving (which at the time the attention of the plaintiff was drawn to it was not more than eight feet distant from the back of the plaintiff's buggy) came in contact with the back of the plaintiff's buggy and made a dent in the leather, which was followed by a second collision of the pole of the carriage in which the defendants were driving coming in contact with plaintiff's back, causing the injury sued for. The defendants claimed that there was but one collision, the first above named, occasioned by the sudden and unwarranted slowing down of the plaintiff's buggy, which under the circumstances was a want of due care, and was a contributing cause

of the injury; the plaintiff claiming that there was no material slowing down of the speed of the plaintiff's buggy, and that the injury complained of was due to the carelessness of the driver of the defendants' carriage, the defendant Helen L. Swift. Said Helen L. Swift testified that at the time of the accident she weighed 108 pounds; that she had driven a one-horse team before, and thought she had driven a pair of horses, but had never driven in New Hampshire roads before; and both Helen and Mr. Borden testified that Caroline F. Swift had nothing to say about who should drive, and exercised no control of the excursion, or gave any direction as to the management of the team. Mrs. Griggs, a witness for the plaintiff, testified that she was seated in her carriage at the side of the road at the time of the accident, was acquainted with defendant, and witnessed the collision, and that she called out to the occupants of defendants' carriage, and said, "Well, what are you trying to do?" that Helen L. Swift replied, "Well, I can't hold them," and Caroline F. Swift said, "She's all right." There was testimony tending to show that plaintiff had endeavored unsuccessfully to find out who were the occupants of the carriage in which defendants were at the time of the accident, and did not discover till long afterwards, and that this was known to defendant Caroline F. Swift, and that, while plaintiff was endeavoring to ascertain the identity of the parties, said Caroline F. Swift asked Mrs. Griggs not to mention it, and said to her, "Let them find out as best they can." There was no other evidence relating to Caroline F. Swift. The defendant Caroline F. Swift asked the court to rule that there was no evidence of any negligence upon the part of defendant Caroline F. Swift, and no evidence of any negligence on the part of any person for whose acts or omissions Caroline F. Swift was legally responsible, and that the verdict on the evidence must be for defendant Caroline F. Swift. The court refused to rule as requested, to which the defendants duly excepted.

L. LE B. HOLMES and A. B. COLLINS, for plaintiff.

CRAPO, CLIFFORD & CLIFFORD, for defendants.

BARKER, J. — The evidence justified a finding that the excursion was a joint undertaking, of which Caroline F. Swift, the mother of the young woman who was driving when the accident happened, was an equal promoter and manager, and not a mere guest; and that, under her control and direction, her daughter, so inexperienced a whip that it might be negligence to allow her to drive upon such an occasion, was driving, and driving carelessly. Therefore the case was for the jury. The evidence of admissions was for the jury, and the rulings were right.

Exceptions overruled.

ALLARD V. HILDRETH.

Supreme Judicial Court, Massachusetts, March, 1899.

MASTER AND SERVANT — EXPLOSION WHILE DIGGING TAMPING OUT OF HOLES — RISK OF EMPLOYMENT. — The master is not liable for an injury to a quarryman who understood quarrymen's work and who, at the request of the superintendent for some one to help clean out the tamping remaining in two holes in a ledge after an attempt to fire them and an explosion, held the drill while it was being struck by the superintendent and another, without any assurance that it was safe to do so and continued after the superintendent said he did not want any water put in the hole as he wanted to fire it as soon as it was cleaned out, though the quarryman knew it was unsafe to do what was being done without water being put in the hole.

EXCEPTIONS from Superior Court, Middlesex County, for refusing rulings requested by defendant.

W. H. BENT and A. O. HAMEL, for plaintiff.

F. E. DUNBAR, for defendant.

HOLMES, J. — This is an action for personal injuries alleged to have been caused by the negligence of a person in the service of the defendant exercising superintendence. The alleged superintendent was one Orrin Carkin, and we assume, for purposes of decision, that there was some evidence that he was a superintendent within the statute. There had been an attempt to fire two holes in a ledge of rock, followed by an explosion, but the tamping remained in the holes. The plaintiff saw Carkin dig the tamping out of one of these holes, and begin work upon the second. Then his son, Frank Carkin, took his place, and Orrin Carkin walked away. At a distance of twenty or thirty feet he turned towards a group of workmen, of which the plaintiff was one, and said, "Some one ought to help him clean that hole out." The plaintiff went to Frank Carkin, and held the drill while Carkin struck it with a hammer. A little later Orrin Carkin returned, and began striking the drill with his hammer also, the plaintiff spooning out the packing as it was loosened. The plaintiff heard some one say: "Somebody ought to put some water in that hole before you drill it out," and Orrin Carkin reply: "Don't want to put any water in it. I want to fire it out as soon as we get it cleaned out." The work went on, and the explosion followed which hurt the plaintiff. One expert testified that in a case like this, when the hole is tightly packed, water ordinarily is poured in. Another testified that one of the methods

employed was that adopted, except that it was not customary for two men to strike the drill. The plaintiff was a quarryman, understanding quarryman's work. He knew the purpose of pouring in water as suggested, knew that there might be an unexploded charge in the hole, and knew that driving in the drill in the manner adopted was liable to cause an explosion.

Upon this state of facts we are of opinion that the plaintiff is not entitled to recover. See *Kenney v. Shaw*, 133 Mass. 501. The only act of Carkin which could be called an act of superintendence was repudiating the suggestion that water should be put in the hole. It is going a little far, perhaps, to hold that this might be found to be negligent on the evidence reported, but we assume that it might be. But whatever danger there was the plaintiff understood as well as the superintendent, who shared his risk. He continued at work knowing all the facts and appreciating the risk. He received no assurance that it was safe, as in *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. Rep. 83, and *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. Rep. 1071. The only ground on which it could be held that he was not on an equal footing with the superintendent or with his employer is his subordinate position. But, if that were enough, it would put an end to the defense of contributory negligence. We cannot make a distinction because of the presence of the superintendent. *Haley v. Case*, 142 Mass. 316, 322, 7 N. E. Rep. 877; *Wescott v. Railroad Co.*, 153 Mass. 460, 27 N. E. Rep. 10.

Exceptions sustained.

MUGFORD V. BOSTON AND MAINE RAILROAD.

Supreme Judicial Court, Massachusetts, March, 1899.

BOY STEALING A RIDE ON FREIGHT TRAIN AND ORDERED OFF BY BRAKEMAN AND INJURED. — Where a boy eleven and one-half years of age was stealing a ride on a slowly moving freight train and was hanging by his hands from the car door on the side of the car with his feet on the truss bar when the brakeman on top of the car saw the boy and raised his hand and said "get off" and the boy looked to see where he was jumping and then jumped off and landed on a pile of cinders from which he slid under the car wheels which cut off both his legs, the company was not liable.

FROM a judgment of Superior Court, Suffolk County, in favor of defendant, plaintiff brings exceptions.

WM. SCHOFIELD and R. G. MCCLUNG, for plaintiff.

LINCOLN & BADGER, for defendant.

HOLMES, J. — The plaintiff, a boy eleven and one-half years old, was "stealing a ride" upon a freight car of the defendant. He was on one side of the car, with his feet on the truss bar, and one or both hands on the handle of the door. The train was moving slowly from a station in East Boston, and starting for Revere. A brakeman on top of the car saw the boy, came towards him, raised his hand, and said, "Get off." The boy looked to see where he was jumping, and then jumped off, landing on a pile of cinders, as he seemed to have intended to, and slipped under the car, which cut off both his legs. This is the injury for which he sues. The court below directed a verdict for the defendant, and the case is here on exceptions.

If we assume, without deciding, that the brakeman was acting within the scope of his authority, nevertheless we are of opinion that the ruling was right. This is not the case of a person being driven by threats of personal violence to jump off a car going at such a high rate of speed as to make it unreasonably dangerous immediately to insist upon the right to have the trespass ended. See *Lovett v. Railroad Co.*, 9 Allen, 557-561 (1); *Railroad Co. v. Kelly*, 36 Kan. 655 (2), 14 Pac. Rep. 172. There is no doubt that the car was moving slowly. The highest rate at which its speed was set by any witness was eight miles an hour. Others said four or six. The speed naturally would increase as the train went on. The command given by the brakeman was no other than the command of the law, and a command to do what the plaintiff, by his own testimony, intended to do a little later, when, at least, it would have been no safer, so far as the speed of the train was concerned. It frightened the plaintiff to the point of obedience, but not to the point of automatic action, or loss of judgment and self-control, as seems to have been the case in *Ansteth v. Railroad Co.*, 145 N. Y. 210 (3), 39 N. E. Rep. 708.

The ground of liability on which the plaintiff seems most to rely is the particular place at which he got off. But, as we have said, the command did not cause the plaintiff to drop in a blind collapse. As it left the plaintiff in command of his reason, it left him free to obey in any reasonable way. Obedience was not a matter of seconds, and the cinders covered only a very short distance. The case, in

1. *Lovett v. Salem & South Danvers R. R. Co.*, 9 Allen, 557, is reported in 3 Am. Neg. Cas. 754.

v. Kelly, 36 Kan. 437, is reported in 3 Am. Neg. Cas. 437.

2. *Kansas City, F. S. & G. R. R. Co.*

3. *Ansteth v. Buffalo R'y Co.*, 145 N. Y. 210, is reported in 5 Am. Neg. Cas. 382.

some respects, is not so strong as *Planz v. Railroad Co.*, 157 Mass. 377, 32 N. E. Rep. 356. See, also, *Leonard v. Railroad Co.*, 170 Mass. 318, 49 N. E. Rep. 621. The absence of a fence to the railroad makes no difference as to the defendant's liability. The plaintiff's trespass was deliberate and intentional, and he cannot ask us to say that, if a fence had been there, it might have changed his purpose, and therefore that the absence of the fence is the cause of his misfortune. We see no sufficient evidence of breach of duty on the part of the defendant or of due care on the part of the plaintiff.

Exceptions overruled.

GANNON v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, March, 1899.

CARRIER AND PASSENGER — BURNING LAMP IN CAR — INJURED WHILE ENDEAVORING TO ESCAPE FROM APPARENT IMMINENT DANGER. — Where it appeared that a lamp in the car in which plaintiff was a passenger blazed up and the conductor and another passenger tried unsuccessfully to fan it out and the plaintiff changed her seat to one near the car door, and a brakeman then attempted to smother the flame with some oily waste which caught fire and blazed and part fell to the floor, and the brakeman rushed to the rear of the car, and it looked as if the car was on fire and the plaintiff became frightened and attempted to leave the car and enter the baggage car, and in her haste struck her arm and received a severe injury, the question of whether plaintiff's conduct was a consequence of defendant's mismanagement was properly left to the jury, and a verdict for her would not be disturbed.

EXCEPTIONS from Superior Court, Barnstable County.

The court refused to take the case from the jury and defendant excepts.

H. H. BAKER, for plaintiff.

H. P. HARRIMAN, for defendant.

HOLMES, J. — This is an action for personal injuries suffered by the plaintiff while a passenger upon a train of the defendant. The case, as stated by the plaintiff's witnesses, was as follows: A lamp opposite where the plaintiff was sitting blazed up. A bystander, and then the conductor, tried to fan out the flame with their hats, but did not succeed, and the plaintiff changed her seat to the other end of the car, next to the baggage car. Then a brakeman tried to

smother the flame with oily waste, which caught fire, and blazed, part of it dropping on the floor. The flames came out underneath the lamp. The brakeman got down, and rushed for the rear end of the car, and it looked as if the car was on fire. Thereupon the plaintiff rose to go into the baggage car, presumably in some haste and fright, and struck her arm, hurting her ulnar nerve so badly that she fainted and fell.

An expert on lamps, who was a passenger, testified that the lamp needed more care than ordinary lamps; that the means used to put out the fire were dangerous; and that, with proper skill, the trouble could have been avoided. The judge refused to take the case from the jury, and the defendant excepted.

The judge who tried the case was right. We cannot say, as matter of law, how frightened the plaintiff was or ought to have been, or how great the peril of the fire may have seemed. There is no question before us of the degree of firmness which the plaintiff was bound to exhibit, or, more accurately, of the defendant's immunity from consequences due to unstable nerves. *Spade v. Railroad Co.* (Suffolk, Jan. 16, 1899), 5 Am. Neg. Rep. 367, 52 N. E. Rep. 747. If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments; and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event. See *Linnehan v. Sampson*, 126 Mass. 506, 511, 512; *Hawks v. Locke*, 139 Mass. 205, 209, 1 N. E. Rep. 543; *Pomeroy v. Inhabitants of Westfield*, 154 Mass. 462, 465, 28 N. E. Rep. 899. We cannot say that an impulsive, and somewhat unguarded, rise from her seat was not a natural and reasonable consequence of the situation as it appeared to the plaintiff. If it was, and if her fear was reasonable, — which, as we have said, we cannot pronounce it not to have been, whatever we may conjecture that we should have thought had we been the jury, — then the plaintiff's conduct is recognized by the law as a consequence of the defendant's mismanagement, for which it is responsible. *Ingalls v. Bills*, 9 Metc. (Mass.) 1; *Sears v. Dennis*, 105 Mass. 310, 313; *Cody v. Railroad Co.*, 151 Mass. 462, 468, 469, 24 N. E. Rep. 402.

The case of *Spade v. Railroad Co.*, 168 Mass. 285, 2 Am. Neg. Rep. 566, 47 N. E. Rep. 88, does not establish a principle contrary to that of the foregoing decisions. It admits that principle, and merely sets a limit to its logical extent, upon practical considerations.

Exceptions overruled.

WHELTON V. WEST END STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, March, 1899.

STATUTE — MASTER AND SERVANT — SUPERINTENDENT. — Under St. 1887, ch. 270, which authorizes a recovery for an injury occasioned by the negligence of a superintendent, a car shifter is not such a superintendent where it appeared that his only duties were to get cars ready for conductors and motormen and to start the turntable.

DEFECTIVE APPLIANCE — PRESUMPTION OF RISK. — Where a street car conductor went to the car house to get his car, and while it was being shifted to the main track by means of an electric turntable, he was given the trolley rope to shift to the other end of the car, and while walking on the floor of the car house his foot was caught under the turntable rails that projected over the floor and were raised about an inch and a half above it, and he was thrown down and injured, the company was not liable as the conductor knew or should have known of the danger to be avoided having done the same work on numerous occasions for more than a year.

EVIDENCE. — Evidence that after the accident the flooring of the car house was raised to meet the rails was properly excluded.

EXCEPTIONS from Superior Court, Suffolk County. There was a verdict for defendant and plaintiff excepts.

ROBERT W. NASON AND THOMAS W. PROCTOR, for plaintiff.

GEORGE H. MELLEN, for defendant.

BARKER, J. — The plaintiff had had nine years' experience as a street-car conductor in the plaintiff's service. He went into a car house for a car. The car had to be moved to the main track, by means of a transfer table moved by electric power, operated by another employee, a car shifter, who, with the plaintiff, were the only persons, in the car house. The car shifter ran the car onto the table. The trolley rope then had to be shifted to the other end of the car. The car shifter handed the trolley rope to the plaintiff, saying, "Here is the rope." The plaintiff, taking the rope, started with it, walking on the floor of the car house. When he was half way around to the middle of the car, the car shifter started the table. The plaintiff called out to him to wait. A spring attached to the roof of the car was caught, and this caused the plaintiff to walk back the other way; and while so doing, and looking up and trying to free the spring, a track rail, which was part of the fittings of the table, and which projected some eighteen inches from it over the car-house floor, with a space of about an inch and a half between

the bottom of the rail and the floor, and which was in motion with the table, caught the plaintiff's toe, threw him down, and pushed him along the floor, and against another rail fastened to the floor. This occurred on June 12, 1895. The transfer table had been put in on June 2, 1894, replacing one to which power was applied in a different manner, and with rails projecting only about half as far. The plaintiff had been in the habit of using such a transfer table five or six times a month since the defendant had used electricity as a motive power. He might have got upon the car before the transfer table started; and the trolley rope was long enough so that if, in shifting the trolley pole, he walked on the car-house floor, he could have kept himself beyond the reach of the projecting rails. At one point in his testimony, he gave an affirmative answer to the question whether, of course, he had not noticed the projections before; but he testified that he took no particular notice of them, and that his attention had never been called to the fact that there was a space between them and the floor. He also testified that he was shifting the trolley pole in the same way he had always been in the habit of doing it at the times when he had done it, and that he had performed exactly the same operation in transferring a car probably a week before, and knew what was to be done. There was a foreman who had charge and control of the car house, to whose orders the plaintiff was subject when he went to the car house for a car, but the foreman was not present at the time of the accident. The declaration has one count, under St. 1887, c. 270, for negligence of a superintendent, and one, under the common law, for negligently failing to furnish a reasonably safe place in which to work. A verdict for the defendant was ordered upon each count. The questions for decision are whether the verdict was rightly ordered, and whether evidence that after the accident the floor of the car house was raised so that the projecting rail lay flush with the floor, filling the space in which the plaintiff's foot was caught, and that after the change the table worked perfectly, offered by the plaintiff, was rightly excluded.

There was no evidence to support the count, under St. 1887, c. 270. The foreman, who was about, had no connection with the accident, nor was it in any way due to his absence. The whole evidence as to the duties of the car shifter is that it was his duty to get cars ready for the conductors and motormen. Neither his starting of the table, nor his failure to stop it, was an act of superintendency.

The evidence as to the raising of the car house floor after the accident was properly excluded. While evidence that other safer appliances then known might have been used would have been competent,

as in *Wheeler v. Manufacturing Co.*, 135 Mass. 294, the evidence excluded was not of that character. *Dacey v. Railroad Co.*, 168 Mass. 480, 3 Am. Neg. Rep. 183, 47 N. E. Rep. 418, and cases cited.

Upon the common-law count, the verdict for the defendant was rightly ordered, for the reason that, upon the circumstances to which the plaintiff himself testified, the risk of having his foot caught by the moving projecting rail, if, looking upward at the trolley, he walked within reach of the projection, was one which he either knew and appreciated or ought, from his opportunities for observation, to have known and appreciated, and which he could have avoided by doing his work in such a way as to keep out of reach of the projection. If he knew the danger, he is prevented from recovering, both because he was careless in not avoiding it, and because he accepted the risk. If he did not know the danger, it was because of a negligent omission to observe what was obvious, and what due care required him to observe and to avoid. Besides an experience of three or four years with quite similar transfer tables, he had for more than a year had numerous occasions to do the same work, in connection with this table, which he was doing when hurt. *Goldthwait v. Railway Co.*, 160 Mass. 554, 36 N. E. Rep. 486, and cases cited; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. Rep. 500; *Cassady v. Railroad Co.*, 164 Mass. 168, 41 N. E. Rep. 129; *Quigley v. Thomas G. Plant Co.*, 165 Mass. 368, 43 N. E. Rep. 205; *Barnard v. Schrafft*, 168 Mass. 211, 46 N. E. Rep. 621; *Bell v. Railroad Co.*, 168 Mass. 443, 3 Am. Neg. Rep. 37, 47 N. E. Rep. 118.

Exceptions overruled.

WASHBURN V. INHABITANTS OF EASTON.

Supreme Judicial Court, Massachusetts, March, 1899.

DEFECTIVE HIGHWAY — SHADE TREES PLANTED CLOSE TO TRAVELED PART OF ROAD. — A town is not liable for injuries to a traveler on a highway on which trees were planted by the road commissioners under Pub. St., ch. 54, § 6, and into which he drove, where he claimed that the trees were located in a position dangerous to public travel, and it did not appear that they were dangerous from decay or in any way except by their location.

FROM a judgment of Superior Court, Bristol County, in favor of defendants, plaintiff brings exceptions.

F. S. HALL, for plaintiff.

H. J. FULLER, for defendants.

HAMMOND, J. — The plaintiff, while traveling with his team in a southerly direction on the highway, overtook another team, and while he was attempting to pass it on the left his carriage came in contact with some shade trees, and he was hurt. These trees were in a line substantially parallel with the easterly wall of the highway, and about six feet distant therefrom, and were in the shoulder of the part of the road which was worked, for travel, and distant easterly from such part two feet and nine inches. The trees had been set out about ten years before, under Pub. St. c. 54, sec. 6, by the road commissioners of the town, who had charge of all matters pertaining to shade trees. The road was about forty feet wide between the walls, and the part worked for travel near the place of the accident was about thirteen or fourteen feet wide. On the west side of the road at the place of the accident there was a level space of about three feet, covered with grass to the shoulder of the road, and from there there was a gradual descent to the westerly wall. From the westerly shoulder of the road to the wall the ground was not very even, and some low brush and cobblestones were there. It was not claimed that the trees were in a dangerous or decayed condition, or that they endangered or hindered public travel in any way except by their location. It did not appear that any complaint about the trees ever had been made to the commissioners, or that these officers had ever made any adjudication as to whether the trees were a nuisance to public travel, except such as may be implied from the fact that the trees were set out by their order, and in the place directed by one of their number. The extent to which the duty imposed by statute upon towns and cities to keep the streets reasonably safe and convenient for travelers thereon is modified by the fact that the objects complained of have been placed within the limits of the street by public authority, has been heretofore somewhat considered by the court. In *Young v. Inhabitants of Yarmouth*, 9 Gray, 386, it was decided that a town was not liable for damages sustained by a traveler upon a highway by reason of a telegraph post erected within the limits of the highway by an electric telegraph company, in a place prescribed by the selectmen of the town, under St. 1849, c. 93, sec. 3. Section 2 of that statute authorized any electric telegraph company to erect posts upon and along any highway, provided the posts did not incommode the use of the highway. Section 3 made it the duty of selectmen of a town or mayor and aldermen of a city to give the company "their writing specifying where the posts may be located, and the kind and height of the same," and it was further provided that after the erection of the posts the selectmen should have the power to direct any alteration

in the location. The trial court instructed the jury that, "if they were satisfied that the telegraph post complained of was an obstruction, rendering the highway dangerous and unsafe for the purposes of ordinary travel, it would be such a defect in the highway as would render the town liable to any one injured thereby." This court held this instruction erroneous, and Mr. Justice Dewey, after stating that the selectmen do not act in this matter as the agents of the town, but as public officers, and that there is no appeal, goes on to say: "The consequence of this necessarily must be that the location of the telegraph posts by the selectmen is conclusive upon all parties. The town cannot interfere and remove them; and their existence upon the highway, if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway for which the town can be held responsible in case of any injury thereby occasioned to any person traveling on such highway. If an improper location of telegraph posts has been allowed by the selectmen, the power is fully vested in the selectmen of the town to direct an alteration in such location, and thus obviate any inconveniences that may be found to exist to the traveler or the public generally. But this is not a matter which the town, in its corporate capacity, can regulate, or for which the town is responsible." In *Com. v. City of Boston*, 97 Mass. 555, which was an indictment for suffering a highway to be incumbered by posts erected under substantially the same statute as re-enacted in Gen. St. c. 64, secs. 2, 3, it was said by the court: "And it seems impossible to conclude that the Legislature, when they gave to a board of public officers the power and duty to direct the places in highways which should be occupied by telegraph poles, and required that their orders should be placed on record, could have intended to leave the existence and continuance of the poles at the places designated to the revision and control of a highway surveyor, or to the discretion of any jury before whom the question might come upon an indictment or action;" and also: "It is not according to the usual policy of the law to commit to one tribunal, in advance, the decision of a simple question of fact, and leave it just as much open to controversy afterwards." The same principle was applied where watering troughs were maintained under St. 1872, c. 84; *Cushing v. Inhabitants of Bedford*, 125 Mass. 526. As was stated by Mr. Justice Morton in *Johnson v. Bridge Corp.*, 109 Mass. 522, 526: "In such cases the liability of towns depends upon the test whether they have the power and it is their duty to remove the obstruction, and put the highway in a safe condition." In the case now before us it is conceded by both parties that the trees were set

out about ten years prior to the accident, by order of the road commissioners, acting under Pub. St. c. 54, sec. 6, and that the provisions of section 10 of that chapter, and of St. 1885, c. 123, are applicable to them. These statutes, in substance, provide that "the * * * road commissioners * * * of a * * * town to whom the care of the * * * roads may be intrusted, may authorize the planting of shade trees therein wherever it will not interfere with the public travel or with private rights," and trees so planted "shall not be deemed a nuisance;" "but upon complaint made to the * * * road commissioners they may cause such trees to be removed * * * if the public necessity seems to them so to require." Pub. St. c. 54, sec. 6. Section 10 of the same chapter and St. 1885, c. 123, forbid the removal of such trees except as therein authorized. These statutes have been considered by this court in two recent decisions. In *Chase v. City of Lowell*, 149 Mass. 85, 21 N. E. Rep. 233, it was said that the question whether such a tree incommodes or endangers travelers, and should be removed, is to be determined not by the summary discretion of a highway surveyor or by a vote of the town, but by the adjudication of a tribunal designated by the statute; and in the same case it was also said: "We think that the statute limits the duty of the surveyor of highways in such a case to procuring an adjudication that the tree is dangerous and shall be removed, and, until it shall be so removed, to taking due precautions against the danger." This case came again in this court (*Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. Rep. 212), and it then appeared that the shade tree had become decayed, and that it was blown over upon the plaintiff, a traveler in the highway. The evidence warranted a finding that it had been in a decayed condition so long a time that the persons having charge of the streets ought to have known of it, and the plaintiff recovered. It was said by Mr. Justice Knowlton, in giving the opinion, that, if such "a tree is in danger of falling, the authorities whose duty it is to keep the way safe and convenient for travelers should do what they reasonably can to protect the public from it." In the light of these and similar decisions we think that, so far as material to the present case, the law relating to the liability of towns and cities under Pub. St. c. 52, sec. 6, for injuries to travelers by reason of shade trees set out under Pub. St. c. 54, sec. 6, may be stated as follows: 1. The question whether a shade tree so set out is, by reason of its locality, dangerous to public travel, and for that reason should be removed, is a question over which the town has no control, but it is to be decided by the public tribunal duly appointed for that purpose (in this case the road commissioners), and the decision is not subject to

review by a jury. 2. This decision, when made, is, until changed, to be assumed as correct under the circumstances existing at the time it was made, and is to be taken as the authoritative declaration of the law that the tree so set out is not dangerous to public travel simply by reason of its locality, under such circumstances; and in the absence of any subsequent physical change in the road, or in some other material respects, the town is justified in assuming that there is no duty to apply for a change in the decision. But, should there be any subsequent material change, the questions whether the tree is thereby made dangerous, and whether it is the duty of the town to provide against such danger, either by application for a change in the location or otherwise, may be submitted to a jury. 3. The only question decided by the public authorities under the statute being whether the public travel is incommoded or endangered by the locality of the tree in a natural, healthy state, and not whether the tree is dangerous by reason of its decayed condition, and consequent liability to fall, the question whether a tree is dangerous from such a liability, and whether the town has used due care to protect the public travel from it when thus dangerous, are always questions which may be submitted to a jury. In this case there is nothing to show that there has been any change since the road commissioners located the trees. The law has, therefore, declared that, under the circumstances existing at the time of the accident, they did not incommode or endanger the public travel, and this decision cannot be revised by a jury. It is not claimed that the accident was due to any defect in the trees themselves.

Exceptions overruled.

O'BRIEN v. WEST END STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, March, 1899.

MASTER AND SERVANT — MOTORMAN INJURED BY ANOTHER CAR STRIKING HIM. — Where it appeared that the rear truck of a street car was derailed at a switch with the rear end so near the other track that there was just room for another car to pass, and the motorman, while trying to right the car with a piece of iron was ordered by his superior to remove the iron and use a crowbar, and as the motorman stooped to withdraw the iron the superior ordered a car on the other track to "come ahead," and as the motorman raised up he was caught between the two cars and was injured, and he heard the order given but did not know to what car it referred, and the motorman on the advancing car did not know of the presence of the other motorman, the questions of negligence were for the jury.

FROM a judgment of Superior Court, Suffolk County, in favor of plaintiff, defendant brings exceptions.

JAMES A. LOWELL, for plaintiff.

G. H. MELLEN and AUSTIN & HAY, for defendant.

LATHROP, J. — There is no dispute about the main facts in this case, and the only question is whether there was sufficient evidence of negligence on the part of the defendant's superintendent to warrant the submission of the case to the jury. The plaintiff was a motorman on an electric car coming towards Boston. About ten minutes before the accident to him happened, the rear truck of his car became derailed at a switch. The effect of the derailment was to throw the rear end of the car so far towards the outward track that there was only just room enough for a car on that track to pass without touching. Before the superintendent arrived, the plaintiff had tried to get the truck on the rails again by starting and backing the car. Failing in this, he left the car, and placed a "cage" under the wheels which were off the track, while a car in the rear hitched on to his car, and attempted to pull the trucks onto the rail. The "cage" was a hollow iron box about fourteen inches long, four inches wide, and three inches thick, with chains and iron pins attached, used for the purpose of inserting therein a drawbar when cars were coupled together. The plaintiff had been at this work about five minutes, when the superintendent came up, and directed the work. After trying to get the car on by means of the cage, the superintendent told the plaintiff to pull up the cage, and to use a crowbar. The plaintiff stooped down by the side of the car, near the rear trucks, for the purpose of taking the cage from underneath the wheels. While so engaged, he heard the superintendent, who was standing near the middle of his car, say, "Come ahead with that car." The car came up on the outward-bound track, and just as it reached the point where the plaintiff was, the plaintiff raised himself from his stooping position, and was caught between the guard rails of the two cars. The plaintiff testified that he did not know to what car the superintendent referred when he gave the order, and there was other evidence to the effect that the superintendent directed the car which struck the plaintiff to come forward, and motioned with his hand to the motorman to advance. This motorman testified that he started his car forward in answer to the motion and order of the superintendent, and that he did not see the plaintiff, and the first he knew of anything wrong was, he heard a shout or groan, and immediately stopped the car. The defendant contends that all this happened in broad daylight; that after the superintendent gave the order to the motorman of the car to come ahead,

he had a right to rely upon his coming ahead with due prudence; and that the accident was caused by the negligence of the motorman, and not by the negligence of the superintendent. There is nothing in the bill of exceptions to show that the accident happened in broad daylight. The exceptions state that the accident happened "at about twenty minutes past five in the afternoon of October 2, 1896." This, according to the almanac, was about sunset. How light it was does not appear. But the question is not whether the motorman was or was not guilty of negligence, but whether there was any evidence which would warrant the jury in finding that the superintendent was guilty of negligence which contributed to the injury. It seems impossible for us to say, as matter of law, that there was no such evidence. The superintendent gave an order to the plaintiff which placed him in a dangerous position if a car should come forward on the other track. He then, while the plaintiff was in this position, gave an order to the motorman on the other track to come ahead. This car, as the exceptions state, before the order was given, was standing at a distance estimated to be six or eight feet from the front end of the plaintiff's car. When the order was given, the jury might well have found that the object was that the car on the outward track should pass the disabled car, and proceed on its way. We have, then, the superintendent giving two orders, which, if obeyed, would place the plaintiff in a dangerous situation. There was certainly evidence of negligence in giving these orders.

Exceptions overruled.

FLYNN v. TOWN OF WATERTOWN.

Supreme Judicial Court, Massachusetts, March, 1899.

DEFECTIVE CROSSWALK—INJURY TO PEDESTRIAN CROSSING STREET.—Where it appeared that the plaintiff, about to cross a street, stepped into the gutter and in taking the next step struck her foot against the end of the crosswalk, and it was light enough for her to have seen where she was stepping if she had looked, but her attention was distracted by an approaching electric car, the questions of negligence were properly left to the jury.

FROM a judgment of Superior Court, Middlesex County, in favor of plaintiff, defendant brings exceptions.

L. G. BLAIR, for plaintiff.

J. E. ABBOTT, for defendant.

LATHROP, J. — The plaintiff was injured while attempting to cross Mt. Auburn street, in the defendant town. Long before the accident there had been a concrete crossing at this place, running from one side of the street to the other. Then the street was widened on the southerly side, a double track of the West End Street-Railway Company was laid in the middle of the street, and that part of the crossing lying southerly of the tracks was taken up. On the northerly side of the street a new sidewalk, with curbing, was laid; and the end of the crosswalk was cut off at a little distance from the curbing. As to the distance from the curbing, the height above the bottom of the gutter, and the condition of the end so cut off, the evidence was conflicting; varying from one foot to two and one-half feet for the distance from the curbing, from three inches to one foot for the height above the gutter, and from comparatively smooth to rough, broken, and jagged for the condition of the end of the walk. The plaintiff, in attempting to cross from the northerly side of the street, stepped into the gutter, and, in taking her next step, struck her foot against the end of the crosswalk, and fell. The question whether the condition of the end of the crosswalk was a defect for which the town was liable was for the jury. *Marvin v. City of New Bedford*, 158 Mass. 464, 466, 33 N. E. Rep. 605, and cases cited.

The only other question is whether there was evidence for the jury that the plaintiff was in the exercise of due care. It appears from the evidence that it was light enough to see, and that, if the plaintiff had looked down as she attempted to cross over the street, she would have noticed the danger and have avoided it. Her attention was distracted by the approach of an electric car. It seems to us impossible to say, as a matter of law, that one crossing a street is obliged to keep his attention fixed upon the ground. The danger usually encountered is that of being run over by passing vehicles. Even one walking on a sidewalk is not obliged, as matter of law, to keep his eyes fixed thereon. *Woods v. City of Boston*, 121 Mass. 337. See, also, *Murphy v. Transfer Co.*, 167 Mass. 199, 45 N. E. Rep. 93. We are of opinion, in the present case, that the question of the plaintiff's due care was rightly submitted to the jury.

Exceptions overrled.

HENDERSON V. GREENFIELD AND TURNERS FALLS RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, March, 1899.

MOTORMAN REPEATEDLY RINGING GONG ON ELECTRIC CAR. — It cannot be said that the ringing of the gong of an electric car on a public street a half dozen or a dozen times is negligence *per se*.

HORSE FRIGHTENED BY RINGING GONG ON ELECTRIC CAR THAT EMITTED SPARKS FROM WHEELS. — Where it appeared that a horse attached to a buggy in which plaintiff was riding was driven alongside an electric car that made a loud noise and emitted sparks from its wheels, and the horse did not take fright until the gong rang, when he bolted and the plaintiff was thrown out and injured, the company was not liable in the absence of evidence that the noise and sparks were due to any defect in construction or negligence in operating the car.

EXCEPTIONS from Superior Court, Franklin County.

The court directed a verdict for defendant at the close of plaintiff's evidence, and he brings exceptions.

The following is plaintiff's bill of exceptions:

"This was an action of tort to recover for personal injuries received by the plaintiff by being thrown from a wagon while riding with one Moreau at Turners Falls in the town of Montague, June 7, 1897. The accident occurred on a public street, about fifty feet wide, known as "Avenue A," in said Turners Falls, near where the avenue is crossed by a street called "Fourth street," and near the store of one Rist. The plaintiff claimed that the horse which said Moreau was driving became frightened at the noise of the gong or bell on an electric car belonging to and operated by the defendant and its employees, and by reason of such noise as was made by the wheels of the car, and by reason of the sparks coming from the wheels of such car. The declaration and answer are made a part of the bill of exceptions.

"John Henderson, the plaintiff, testified as follows: 'On June 7, 1897, I was riding from Greenfield to Turners Falls in a wagon with Mr. Moreau. I sat upon the left-hand side of the wagon. Moreau was driving the horse. We struck Avenue A near the southerly end, by the watering trough. I could see an electric car up near the other end of the avenue, between a quarter and a half mile away, at its starting place. The street-railway track is in the center of the avenue. Moreau and I drove up the avenue on the right-hand side of the railroad track. The horse was not trotting fast. He

was going at a regular gait, and the Millers Falls car, which was ahead of another car, stopped on the crosswalk on Fourth street, — the crosswalk on the avenue. The horse came close up to the car, and the cars, as I thought, started pretty quick after getting out a passenger, and the horse acted as though he was a little afraid when they came face to face, — the car and him. The horse turned round quick, all in an instant, but before that the horse didn't seem to be scared of it, till the man on the car commenced ringing the alarm bell, — the gong. Then the horse went out. Before the horse shied, I hollered to the motorman to stop it. He didn't answer me. I said, "Stop that gong." I hadn't time to holler a second time, when the horse turned round quick, like that (showing), and threw me out on the curbstone. The appearance of the car was unusual. It sounded to me as though the car were running over pebblestones or something on the track. It made a loud noise, and I could see a little fire — a little light — come from the wheels. I suppose it came from the rail and flew out. It was on the side that I was on, but it didn't come out so I think either the motorman or the passengers or the conductor could see it. I think it was caused a good deal from the pebblestones the wheels were running over. It made a loud noise. The horse shied off to one side. He didn't run back; he turned right around quick. I was thrown upon the ground, and I didn't come to immediately. The car, when I next saw it, was pretty near opposite to me. It was stopped. May have been two or three yards away; might have been five. It was only a very short distance. The Greenfield car was close behind this car, and followed it right up. The spark came from the front car.' In cross-examination the witness testified as follows: 'Mr. Moreau works for the Montague Paper Company on boilers, and has been the owner of horses, and he traded on that day for the one he was driving at the time of the accident. Moreau was driving me home, with the intention of going back to his own home. The car track of the defendant is in the center of the avenue. There was room enough on either side for a carriage to pass the car. The first notice that I took of the car coming towards us was when it was at Third street. Moreau and I drove along. We made no stops and kept along at about the same gait. The car came to a stop at Fourth street. I think the first place that he showed any signs of being alarmed at the car coming was at the sound of the gong. He acted shy when he heard the bell. The car was moving at this time. At the time that the horse turned round, they were face to face. The horse, when he first showed any disturbance, might have been ten yards, or five, from the car. I don't think it was five yards, to the

best of my knowledge. I don't think the car stopped before I was thrown out. The bell rang. I can't say how many times it rang. It might have rung a dozen times, might not have been more than half a dozen, but I noticed he kept pounding at it all the time. I couldn't tell how many times. It seemed as though it was as much as half a dozen times, anyway. That is what frightened the horse. I don't think the spark had much to do with it. It was the bell and the flapping of the wheels. The wheels made a big noise, — a kind of flapping, rattling noise. The car ran betwixt thirty-five and forty yards from the place it had stopped at Fourth street. I think, if the man hadn't rung the bell, we would have gone by safely. The horse started at the first sound of the bell. He kind of acted, — put up his ears and acted as though he was pretty lively. He didn't do no plunging, not a bit. He did nothing besides put his ears up. He was a young horse, I suppose, high-lifed. I don't know how old he was; couldn't have been over eight or nine years old. The first that I noticed was the ears of the horse. I was watching the car more than the horse, but I noticed the horse so far as that was concerned, that when he got up face to face he didn't do any plunging. Probably he acted a little shy, about as far as from here to you. In order of events the first thing was the sound of the bell or gong, and the horse showing disturbance at it. The next thing was that he came up to the car, and turned right around like that (showing), and upset the team, and I got thrown out. It might have taken half a minute for it to happen; might be a minute. I don't believe it was more than half a minute. We were right opposite the car at the time we heard the bell and tipped over. Moreau had the reins in his hands all the time that we drove up the avenue. There was no slip or loss of control on his part, and the horse behaved well. The horse turned round, I think, because he was stronger than the man. The horse was too spry for him and too strong for him. I suppose that was the reason he turned around, because Mr. Moreau is a good man with a horse, well used to them; a good driver.'

" Moreau, a witness called by the plaintiff, and the person with whom he was riding and who was doing the driving at the time of the accident, testified as follows: 'I have almost always owned horses. I was taking Henderson home on the day of the accident. As I got part way up the avenue, I saw the cars at the end of the street. I paid no attention to them because the man I got this horse of told me he was not afraid of the electric cars. I crawled along up to the cars. I had my reins in my hand, and was watching the horse, and he heard the bell ring, and just cocked his ears a

little mite. I turned to Henderson then, and I said, "This horse is not afraid of the cars," and went right along, and, just as we came opposite the car, the bell clanged, and the horse bolted right round. His forward feet came over the curbing, and the buggy turned over onto the two hubs. I jumped out, and it threw Mr. Henderson out, and my cushions came out on the street. I held the reins with one hand, and with help that came from the street we righted the buggy up again. After the accident I drove around the electric cars, and went right back where the cars were. The horse didn't appear to be afraid of the cars. There were two cars and I went between them. It was the head car that caused the trouble. The accident occurred in the afternoon. It was not dark. I didn't notice the car stop until after my horse had bolted. My horse's feet were then out the car tracks, and I looked around to see if the car was coming, and my wagon was turned over. After the horse turned the wagon over, he turned back in the same direction we had come. I heard Henderson say something to the motorman, but I couldn't say what, because my attention was taken up with the horse all the time. I didn't notice the fire fly from the wheels. My attention was on my horse. That was what I was looking after. My horse wasn't acting bad. He was not until that bell clanged, but, as soon as that clanged, the horse bolted in an instant. It didn't take half a minute before we were turned wrong side out. I couldn't say how many times the bell clanged, but just as I got near the car it clanged, and that called the horse's attention, but he merely pricked his ears up and went right along; and when he got to the car the bell clanged again, and the horse went round so quick I couldn't tell what happened afterwards.' In cross-examination the witness testified as follows: 'I had owned the horse about fifteen minutes. I had just made the trade. I had never seen the horse before. I should think he was between eight and nine years old. I don't remember the name of the man with whom I traded. I should think he was a Yankee, by his conversation. He told me that the horse was not afraid of the electric cars, and I believed him; but he said he was a little afraid of the steam cars. The horse behaved all right as we drove up the avenue. I remarked to Henderson, "The horse is not afraid of the electric cars." I was perhaps within two hundred feet of the car when I made the remark. I think the car was standing still at Fourth street, though I won't be certain. The car was at about Fourth street, and it is my best judgment that it was standing still. I should judge it was about two hundred feet off when I made the remark that he wasn't afraid of the cars. We went right along

towards the car. I had hold of the reins, — one rein in each hand. My feet were against the foot brace, and I had no idea of any trouble. The car was coming towards us, and we were going towards the car. The first thing that called the attention of the horse was the ringing of the bell. When he got up opposite the car, and the bell rang, the horse bolted short round. When the bell first rang, the horse just held up his head, pricked up his ears, and didn't seem to act as though he wanted to do anything wrong; only looked up towards the car, and kept going right along. There wasn't anything strange about a horse pricking up his ears when a bell rings. There wasn't anything about the horse that showed unruliness whatever. He was going on a trot at the rate of about four or five miles an hour. I suppose it was at the sound of the second bell that he bolted short round. When he got up nearer to the car, when the bell clanged, he bolted right short round. I couldn't say how many times the bell struck, but I know, before he got to the car, the bell struck, and that called his attention, and just as he got there that bell clanged again, and he bolted right round. I can't say how many times they rung the bell, but I was right opposite the car when the bell clanged and the horse went round. Q. Can you tell whether the horse was frightened the second time the bell rang? A. Yes, sir. Q. Was it before the sixth time? A. Why, yes.'

"After the examination of Moreau, the plaintiff was recalled, and testified as follows: 'The horse, when it first showed evidences of fright, might have been four or five yards from the car — twelve or fifteen feet. The car was opposite when I was thrown out. The car had gone probably forty-five yards before it stopped. I should think, when the horse put up his ears and looked a little shy, it was at the noise of the gong, — the bell on the car. There was nothing else before we got the tip. The horse went right along in a well-behaved manner until he got right up to the car and then he turned right around and upset the buggy; not as quick as I indicate by my finger, but pretty quick. We were right opposite the end of the car, and the car was running at the time. I think the clanging of the gong sounded a little faster and louder than it generally does. It was a continual clanging.'

"It is agreed that defendant had a right to operate its cars on said Avenue A; it is agreed that the track, cars, and the servants operating them were the defendants; and it is agreed that the plaintiff received injury. This is all the evidence material to a determination of this bill of exceptions.

"At the close of the testimony for the plaintiff, the defendants

requested the court to rule that the evidence was insufficient to warrant a verdict for the plaintiff. The court so ruled, and instructed the jury to find a verdict for the defendants, to which ruling the plaintiff duly excepted, and, being aggrieved thereby, prays that these exceptions may be allowed."

B. H. WINN and L. W. GRISWOLD, for plaintiff.

JOHN A. AIKEN and DANA MALONE, for defendant.

MORTON, J. — The ruling was right. Up to the moment of the accident there was nothing in the behavior of the horse which rendered it negligent on the part of the motorman to ring the gong, and it cannot be said that to ring the gong on an electric car in a public street half a dozen or a dozen times, which the plaintiff says was done, is of itself, without anything more, evidence of negligence. There was nothing to show that the noise and sparks were due to any defect in construction or negligence in operation.

Exceptions overruled.

YORE V. MUELLER COAL, HEAVY HAULING AND TRANSFER COMPANY.

Supreme Court, Missouri, Division No. 1, February, 1899.

HIGHWAYS — LAW OF THE ROAD — PEDESTRIAN STRUCK BY TEAM.

— Section 7831, Rev. St. 1889, requiring drivers of vehicles when meeting on highways to turn to the right of the center of the road has no application to a driver meeting a pedestrian and negligence will not be imputed to a driver colliding with a pedestrian because he was driving on the left side of the street.

APPEAL from order, St. Louis Circuit Court, granting a new trial to plaintiff after judgment for defendant.

This is an appeal from an order setting aside a verdict and judgment in favor of defendant, and granting to plaintiff a new trial. The action is for personal injuries sustained by plaintiff on account of being struck and run over by a team and wagon of defendant going east on the north side of Washington avenue in the city of St. Louis, under the following circumstances: At about six o'clock on the evening of January 6, 1895, plaintiff took his position on the pavement on the north side of Washington avenue, about forty feet west from the west line of Eighth street, for the purpose of boarding a Washington avenue street car when it would come along going west. When a car came opposite to where plaintiff was standing,

he stepped from the sidewalk to get upon it, but only got three or four feet from the sidewalk towards the car, when he collided with one of two mules which were hitched to a wagon being driven eastwardly on the north side of said avenue by one of defendant's employees. Plaintiff, who was the only witness that testified on his behalf as to how the accident occurred, says that the forepart of the mule struck him, and knocked him towards the wheels of the wagon, and that one of the front wheels passed over his body, inflicting quite severe injuries. Plaintiff says that he had taken car for his home at about the same time of day, and at about the same place he was attempting to board it on this occasion, almost daily for the previous three weeks; that, while it was a cloudy day, and getting dark at that time, the electric light at the center of the intersection of Eighth street and Washington avenue was burning, and the car was also well lighted, so that he could have seen the team that struck him if he had looked in the direction it was coming before leaving the sidewalk, but that he did not look that way, and that he neither saw nor heard the team before he collided with it. There was also testimony given in behalf of plaintiff that may, for the sake of this discussion, be treated as tending to show that the team (of defendant) that struck plaintiff was noticed going in a trot eastwardly at a point about one-half a block distant just a few seconds before the accident. No one, however, except defendant's driver, undertook to give the speed of the team at the time it came in contact with plaintiff, and he says that the team was being driven in a walk, and that plaintiff stepped from the curbstone of the pavement without looking, and that, while within but three or four feet from the curbstone, he ran against the hind part or hip of the mule of his team (that was) nearest to the sidewalk, and was knocked or thrown down by the jumping of the mule to one side, and that, before he was able to check them, the fore wheel of the wagon to which the mules were hitched, and which he was driving, ran over the plaintiff, but that he turned the team so quickly, when he realized the trouble, that the hind wheel of the wagon did not run over or against plaintiff; that he had no knowledge or intimation that plaintiff contemplated to pass to the car in advance of his team until he had stepped from the curbstone, and ran against one of the mules, and that after plaintiff left the sidewalk there was not sufficient time for him to act so as to avert the collision and accident; that the distance between the team he was driving and the car upon one side and the curbing of the sidewalk upon the other was only three or four feet; that he was one of the teamsters of the defendant, engaged in the work of gathering up the sweepings from the side of the streets in

the city, in the work of street cleaning, and that at the time of the accident he was going to Eighth street to gather up a load of trash that had just been swept into the gutter of said street by the street sweeper assisting in the work of street cleaning. After the testimony was all in, the court, at the instance of the plaintiff and defendant and on its own motion, gave eight instructions covering the different phases of the case as was then presented for consideration; but during the opening argument to the jury plaintiff's counsel commented upon the fact that the driver of the team was at the time of the accident driving on the north, instead of the south, side of the street, and told the jury that that fact, in connection with the accident, indicated negligence upon the part of the driver sufficient to justify a verdict against the defendant. As soon as plaintiff's counsel had concluded his opening argument, defendant's counsel asked, and the court gave, this additional instruction: "The jury are instructed that the fact that the driver of the team in question was at the time of the accident driving eastwardly along the north side of Washington avenue does not constitute negligence upon his part, or upon the part of defendant." Plaintiff made no objection, at the time or afterwards, to the giving of that instruction, based on the ground that it was "irregularly given." When the court gave the instruction it said to plaintiff's counsel that he could continue his opening address to the jury, and argue the case further under the instructions as supplemented. Counsel for plaintiff made no further argument in the case at that time, but said to the court he would discuss that instruction when he came to make his closing argument to the jury. After defendant's counsel had made his argument to the jury, the court, at the instance of plaintiff's counsel, gave the following additional instruction: "The court instructs the jury that the mere fact that the defendant's driver drove in the north side of Washington avenue instead of upon the south side is not of itself negligence, but is a fact that may be considered by the jury in connection with all other facts in the case, to determine whether the driver of the team was in fact guilty of negligence,"—both of which last instructions plaintiff's counsel discussed in his closing argument. After plaintiff's closing argument, the case was submitted to the jury upon the eight original and the two additional instructions just quoted, and a verdict was found and judgment entered in favor of the defendant, and plaintiff filed his motion for a new trial, assigning, as grounds therefor, that the court erred 1, in giving instructions asked by defendant; 2, in the instructions given to the jury on its own motion; 3, in giving contradictory instructions; 4, "the instructions given at the instance of defendant.

and on its [the court's] own motion were misleading." Plaintiff's motion for a new trial was sustained, and the court specified of record its ground therefor, as follows: "The motion for new trial is sustained on the ground that the instructions (the two given during the argument of the case) were irregularly given." From that order, after the usual preliminaries, defendant prosecuted this appeal.

J. D. JOHNSON, for appellant.

D. P. DYER, for respondent.

ROBINSON, J. (after stating the facts). — From an examination of the instructions given as a whole, we find no declaration of law announced therein unfavorable or prejudicial to the right of the plaintiff that for that reason would have justified the trial court in granting to him a new trial, and we must conclude, if the order of the trial court is to be sustained, that the reason given in said order, "that the instructions (the two given during the argument of the case) were irregular," alone justified the court's action. Of the last one of the two instructions given during the argument of the case, surely plaintiff ought not now be heard to complain of its irregularity, as it was given at the time on his express demand, nor should he be permitted now to reap the benefit from an irregularity resulting from the giving of either one or both of the last two instructions (if such it could be properly characterized), when he did not ask for a new trial in his motion predicated upon that ground, nor did he object to the giving of either of said instructions on that ground at the time they were asked for and given. Was, then, the giving of the last two instructions, or either of them, after the argument in the case had been begun, such an irregularity or error as alone would give justification to the court's action in awarding a new trial based upon that fact solely? This court has never held the provisions of section 2188, Rev. St. 1889, as mandatory, or that the section should be so construed as to deny to the trial court the right to give instructions in any cause except just where "the evidence is concluded, and before the case is argued or submitted to the jury," or that an instruction, if given at any different or later time during the progress of a trial, should be treated and held, for that reason alone, as an irregularity constituting grounds for the granting of a new trial. Nor do we think the trial judge has the right to set aside a verdict rendered in his court for the sole reason that an instruction has been given during the progress of the trial out of the usual time for the giving of same as indicated by section 2188, *supra*, without it further finds and believes that the instructions as given at the designated time had the effect of working a prejudice against one or the other of the parties to the suit that

otherwise would not have occurred had the instruction been given at the regular and prescribed time named in said section. That section is not to be understood as laying down a fixed and arbitrary rule of procedure, the variation from which (to meet the demands of justice in a given case) is to be treated and held as a necessarily fatal irregularity. The question as to the right of the trial court to instruct the jury at a time otherwise than immediately after the evidence is concluded, and before the case is argued, has frequently been before this court, yet we know of no instance where, on the ground of time alone, the giving of an instruction has been held fatal to a verdict predicated thereon. The practice has ever been to sustain verdicts and judgments predicated upon instructions given at any and all times during the consideration of the case by the jury, provided the instruction or instructions announce a correct proposition of law, applicable to the facts of the case, and is given to the jury in open court, and the parties to the suit have been given an opportunity to know its contents, and to note his or their exceptions thereto, if desired, or to ask other instructions explanatory thereof, if necessary. It was not only within the authority of the court to give the instruction asked by defendant at the time it was given, but we think it was likewise a clear duty of the court, made necessary by the false argument of the counsel for the plaintiff in addressing the jury, to the effect that the jury might infer negligence from the fact that defendant's driver was at the time of the collision driving along the north side, instead of on the south side, of the street. As between a footman in the act of attempting to cross a street (or a portion of it, as, in this case, to reach a street car in the center thereof) and the driver of a team of horses upon the street, there is no rule or custom that may be said to have ripened into law that requires, or even indicates, that the teamster, with his team, should pursue his course eastwardly along the south side of the street, rather than upon the north side thereof; or that, if a team should be traveling eastwardly upon the north side of a street, and should collide with a footman thereon, whether in an attempt to cross the street or in pursuing his journey westwardly along the same side of the street, that any presumption of negligence would arise against the teamster from that fact alone, if an injury should result to the footman from such collision. The rule for the passage of vehicles on the public highways prescribed by section 7831, Rev. St. 1889, requiring that, when drivers thereon shall meet, each shall reasonably turn his vehicle to the right of the center of the road, so as to permit the other to pass without interference or interruption, etc., has no application to the facts of this

case whatever; nor does that section, or any custom or rule in force in this State, go to the limit of requiring that a teamster or a traveler by vehicle shall be required to use one side of the public road, or the street of a city, to the exclusion of the other, under penalty of having imputed to him negligence for said act in the event of an accident or collision. The instructions given by the court, at defendant's request, at the close of the first argument in the case to the jury, was proper, and the giving of the other, at plaintiff's request, afterwards, is a thing about which he cannot be heard to complain, and both, although given after the time designated by the statute for the giving of instructions, was not such an irregularity as to constitute error authorizing the court on that ground alone to set aside a verdict that upon all the testimony was for the right party (and was otherwise correct). The order setting aside the verdict and judgment of the trial court is reversed, and the cause is remanded, with directions that final judgment be entered for defendant upon the verdict as returned by the jury.

BRACE, P. J., and MARSHALL, J., concur.

BARTLEY V. METROPOLITAN STREET RAILWAY COMPANY.

Supreme Court, Missouri, Division No. 1, February, 1899.

PLEADING — PROOF. — A complaint alleging that the negligent act of the gripman of a street car in operating the gripiron caused the car to jerk with such force that plaintiff's hold was broken, and he was thrown to the street with great force, limits the plaintiff to proof of the specific negligence averred.

THROWN FROM CABLE CAR FOOT BOARD BY JERK OF CAR. — Where the plaintiff's evidence showed that he was thrown from a cable car foot board by a jerk of the car caused by some act of the gripman, without showing what the gripman did or how he caused the jerk or that he caused it at all, it was insufficient to entitle its submission to the jury.

SAME. — In order to recover from a cable railroad company for injuries received by being thrown from a car it is not enough to show that a jerk of the car was the cause of the accident.

APPEAL from order of Circuit Court, Jackson County, granting plaintiff a new trial.

Action to recover \$25,000 damages for personal injuries. The material allegations of the petition are that defendant owns and operates a street railway in Kansas City, Mo., which is operated " by

means of an endless cable running underground, driven by steam force, the cars being attached to said cable by a device called a 'grip iron,' which may be tightened and loosened on said rope in such manner as to cause the cars to stop steadily or with a sudden jerk in starting or while running, depending altogether upon the care used by defendant's servant in charge thereof, known as the 'gripman;' " that on the 24th of December, 1893, about seven o'clock in the morning, plaintiff became a passenger on one of defendant's trains of cars, by boarding the same at the intersection of Twelfth and Jefferson streets, for the purpose of going to his place of business; that a great number of people patronize defendant's road in the morning hours, and, although it was defendant's duty to furnish cars enough to reasonably accommodate the traveling public, the defendant " ran so few cars, and at such long intervals, at the date aforesaid, that the cars were so crowded that it was impossible for plaintiff to get a seat, and defendant permitted plaintiff, with many other passengers, to ride on the running board at the side of the car, where he was compelled to stand and hold onto the posts of said car;" that it was defendant's duty, while its cars were so loaded, to so operate them, in a reasonably careful and prudent manner, as to prevent throwing its passengers off; that after plaintiff boarded said car and was standing and holding onto said posts, and had been seen by the gripman, the " said gripman so carelessly and negligently operated said grip iron as to cause said car to jerk and lurch with such force that it broke the plaintiff's hold, and threw him on the paved street with great force," injuring him so severely that his mind is affected, and he is permanently disabled. The defendant filed a verified answer, setting up 1, a general denial; 2, a plea of contributory negligence; 3, a release by plaintiff, in consideration of \$20, of all claims and demands arising out of the accident, and specifying that no attempt should be made by plaintiff to set aside the release, but, if any such attempt should be made, the plaintiff should deposit the \$20 with the clerk of the Circuit Court of Jackson county, as a condition precedent to any such attempt to set aside the release, and that no tender or offer to return the \$20 was ever made by plaintiff. The unverified reply of plaintiff denied 1, that the release was the release of the plaintiff, because at the date of it plaintiff " had just come out of the hospital, was yet ailing, and had not recovered from his injuries, and was unfit to be talked to on any matter of business, on account of his injuries and the effect it had on his mind, and that he was mentally incapacitated from contracting," and therefore " he is not bound by said release." 2. That defendant sent two of its

special agents to plaintiff, who told him the defendant had sent him \$20, "to pay on his hospital dues, and asked that he sign a receipt for the same; stating at the same time that the company would settle with him for his injury as soon as he was able to be about. Plaintiff at this time was, on account of his injury, unable to read or do business of any kind, when said agent did then and there falsely and fraudulently read to plaintiff what pretended to be a simple receipt for twenty dollars, and did thereby obtain the signature of plaintiff to the pretended release by so falsely reading the same, and inducing plaintiff to believe he was only signing and executing a simple receipt for twenty dollars, when in truth and in fact they were at the time falsely and fraudulently obtaining his signature to the pretended release;" and therefore he says the release or contract is not his, and he is not bound by it. At the beginning of the trial the defendant objected to the admission of any evidence, on the ground that the defendant was entitled to a judgment because the reply is a departure from the petition, because the matters set up in the reply cannot be set up by way of reply, because the matters set up in the reply are not cognizable at law, and because such matters constitute no reason for avoiding the release. The court overruled the objection, and the defendant excepted.

Plaintiff's version of the accident is that about seven o'clock on Sunday morning, December 24, 1893, at Twelfth and Jefferson streets, in Kansas City, he boarded the grip car of one of defendant's trains of cable cars, for the purpose of going to the saloon at No. 1519 Bell street, where he worked; that he got on the "running board" or "foot board," as it is convertibly designated, of the grip car, at about the center of the car; that the car was full, except the first or second double seat from the front of the car, which was occupied only by John Watkins, a friend of his; that he stood on the running board, and held onto one of the posts or uprights, intending to so stand until he reached his destination, and made no effort to go forward and take a seat on the double seat, where his friend Watkins was; that the car had nearly stopped when he got on the car, and, after he got on, that the car stopped completely; that he did not know whether the trailer, which was a closed car, was full or not; that the car was started again, and had gone about thirty or forty feet, and had attained the full speed of the cable rope, when "it kind of stopped, or something, — gave a lurch. I don't quite understand how it was, but it gave a lurch, or something, the nature of which I don't understand;" that he does not understand what caused it. "Q. Well, what did you notice on the part of the gripman, in the way of his doing anything, at the time

of that jerk you speak of?" "A. Well, it was some action of his, but what it was I can't say positively. He did something, but whether he was running faster than the speed of the rope, or not, I don't know, but I think he was. I know he caught the rope with a quick jerk, or made a motion with his grip like as if he was, and the jerk came right away, and that was the last I remembered." The plaintiff's hold on the upright or post was loosened, and he fell on the pavement, and was severely injured. No one else on the car felt any unusual jerk or lurch. George Price, a passenger on the train, and a witness for plaintiff, who was seated on the side of the grip car which the plaintiff boarded, and just behind the gripman, said that plaintiff got on the grip car about where he was sitting; that there was a vacant seat just ahead of him, and another just behind him; that plaintiff was going along on the running board towards the vacant seat ahead of him, when he fell off; that the car had moved about half a block after plaintiff boarded it before he fell off. "Q. Yes, sir; what caused him to fall, if you know? A. Well, I don't know of anything, unless it was a little kind of sharp jerk that the car gave. * * * Q. I will get you to state if, at the time of this jar or shock that you speak of, whether or not at that time you noticed the gripman, to observe what he was doing, — whether or not he was jerking up or tightening up on his grip? A. No, sir; he was not jerking, but he had hold of the rod or grip. Q. What caused the jerk, if you know? A. I don't know, sir. Q. There was a jerk? A. Yes, sir; a jerk or jar. Q. Was it very perceptible? A. No, sir; not very, only there was a kind of a jerk * * * Q. (on cross-examination). You have ridden on these cars, haven't you, when the slack — what is called the 'slack in the rope' — came and went? A. Yes, sir. Q. Well, was it that — the slack in the rope — that you struck at that particular time? A. Yes, sir. Q. That was what caused the car to give the lurch that it gave? A. I think so. Q. There is no other way of accounting for it, from what you saw? A. That is what I thought it was. Q. Well, do you say it was not the gripman jerking on the grip that caused it? A. No, sir; I don't think that he did it. Q. You did not see the gripman make any jerk — pull or jerk on the lever that works the grip on the cable — that would account for this? A. I think not." Plaintiff had been riding on defendant's cars nearly every morning and evening for nearly two years previous to the accident, and knew how cable cars were managed and run. There was much testimony introduced by plaintiff concerning the release, and his condition at the time he signed it; his version being that a day or two after he got out of the hospital two representatives of the defendant came to

his house, and brought him a check for \$20, to pay the sisters at the hospital, and told him not to talk about the case, or to consult any one or to employ any counsel, until he was in a condition to talk to the representatives of the company; and that he would be treated fairly.

Plaintiff read in evidence the following stipulation: "It is admitted, for the purposes of this trial, that the cars in question are operated by means of an endless steel-wire cable rope, in an underground conduit between the rails of the track, propelled by steam force from the power house. The cars are attached to the cable rope by means of a device called the 'grip iron,' running from the car down through the slotted rail, at the end of which are jaws or bars which are opened or closed by the grip lever, operated by the gripman, so that to move the car these jaws are closed so that they become fastened to the rope, and when the car is stopped the jaws are loosened from the rope. The cable rope is propelled at a regular rate of speed of about eight miles an hour, as authorized by ordinance."

The defendant demurred to the evidence at the close of plaintiff's case. The court overruled the demurrer, and the defendant excepted.

The defendant's version of the accident was as follows: G. W. Hartman, a passenger who was seated on the grip car, in one of the single seats to the right of the gripman, testified that when plaintiff got on the grip car he took the vacant seat just behind him; that almost immediately he rose, got out on the foot board, and started towards the front end of the car. "Q. Well, state how he fell off. A. Well, he seemed to try to catch the upright piece that was immediately in front of the seat in which I was sitting, and missed it, and fell off — just pitched right off. Q. What, if any, jerk or jar was there of the car, that you observed, or know anything about? A. There was none that I felt. I don't know of any. Q. You did not feel any? A. No, sir." The witness further testified that the gripman did nothing, that he saw, that would cause the car to jerk; that there were vacant seats on the grip car on the side which plaintiff boarded. James Rowland, a passenger seated on the trailer, testified that the car in which he was riding was not crowded, and that he noticed no jerk or jar or lurch when plaintiff fell off. Edward Murphy, a passenger seated on the trailer, gave similar testimony to Rowland's. John Derry, a passenger seated on the trailer, testified that plaintiff got on the running board of the grip car, and was moving towards the front of the grip when he fell off; that there was no jerk or jar or lurch; that the car was running along as it usually does; that there were vacant seats both in the trailer and on the

grip car, there not being more than fifteen persons on the train. J. W. Watkins, seated in one of the double seats of the grip car, opposite to the side on which plaintiff boarded the car, testified that plaintiff got on the running board of the car, about the center of the car, and walked along the foot board or running board towards the front of the car, and "he just fell off of the car, and that was all there was to it;" that there was nothing unusual in the manner in which the car was run, — no unusual motion or movement of the car; that there were vacant seats on both sides of the grip car. H. L. Mitchell, the conductor of the train, testified that plaintiff got on the running board of the grip car, then walked towards the front of the car and fell off; that there was nothing unusual in the motion of the car that caused him to fall off. W. R. Wines, the gripman, testified that plaintiff got on the running board of the grip car, and moved towards the front end of the car, and while doing so fell off; that the car was running at the full speed of the rope; that he did nothing to cause any jerk or lurch; that it was a very cold morning, and he did not have hold of the lever, as the iron is cold to hold in one's hands in cold weather; that there were many vacant seats on both sides of the grip car. Defendant introduced the release in evidence, and also testimony as to the circumstances attending the execution of the release, and tending to contradict the testimony produced by plaintiff, and to show that it was intended and understood by plaintiff to be a settlement and a release, and that the plaintiff was in a condition of mind to understand what he was doing and what it meant.

At the request of the plaintiff, the court instructed the jury as follows: "1. If the jury believe from the evidence that plaintiff boarded the car of defendant for the purpose of being transported to the West Bottoms, with the intention of paying the usual fare therefor, then he was a passenger of defendant, and it became its duty to give plaintiff a reasonable time to become seated before starting its car, or of starting the same with a reasonable degree of care, so as not to throw plaintiff off while he was in the act of getting a seat; or, if there was no vacant seat, it was the duty of defendant's servants to so reasonably run the train as to make it reasonably safe for him to ride and hold on where he was compelled to stand. If you find from the evidence that plaintiff was in the act of getting to a seat, or that he was standing on the foot board, holding to the upright, because he could get no seat, and you find that the car was carelessly started with a sudden jerk, or that after starting the train it was so carelessly operated that it caused a jerk or lurch, and that this was the cause of plaintiff's fall, by jerking plaintiff's handhold

loose and throwing him to the ground, whereby he was injured, without fault on his part, then he is entitled to recover, unless barred by the release pleaded in the answer of defendant. 2. If the jury believe from the evidence that the mind of the plaintiff was so affected, at the time he received the twenty dollars and signed the contract of release pleaded in the answer, that he did not understand the nature of the contract, and was by reason of such infirmity incapable of comprehending the business in which he was engaged, or if you believe from the evidence that the agents of defendant fraudulently misrepresented to the plaintiff the contents of the paper, and by any artifice induced him to sign the release under the belief that he was signing some other instrument only for twenty dollars, in either event he is not barred from recovering in this case on account of said release so pleaded by defendant. 3. The jury are instructed that the care required of the servants of defendant in the management and operation of the train in question at the time mentioned was such care as would be reasonably expected of very prudent persons in the management of the same or like business. 4. If the jury find for plaintiff, in estimating his damages they will take into consideration his physical suffering and mental anguish, if any, caused by the injury, also his present physical condition, if you find such condition the result of the injury, and, if you believe from the evidence that the injury is permanent, you will consider his suffering, both mental and physical, in the future, and allow him such damages as you believe he has sustained as a direct result of the injury complained of, not exceeding twenty-five thousand dollars. 5. The court instructs the jury that they are the sole judges of the weight of evidence, as well as the credibility of the witnesses, and in determining the weight of evidence the jury are not bound solely by the number of witnesses testifying to any fact, but they may consider their situation with relation to the facts they have testified about, their likelihood, under all the circumstances in evidence surrounding them, of knowing the facts they have testified about, as well as the reasonableness of its truth, taken together with all the other facts and circumstances in evidence surrounding the whole case; and, if you believe from the evidence that any witness has willfully sworn falsely to any material fact in issue, you are at liberty to disregard the whole testimony of such witness. 6. If you find the other issues submitted to you in favor of the plaintiff, and you believe from the evidence that the \$20 paid to him was to pay his hospital bill, then it is not necessary that the same be deposited with the clerk of this court, but should be deducted from any amount, if any, you find plaintiff entitled to recover." The plaintiff

asked and the court refused to instruct the jury as follows: " 7. The care required of plaintiff in this case was such as would be required of reasonably prudent persons under like or similar circumstances. If his conduct at the time and prior to the injury was such conduct as might be reasonably expected of a reasonably prudent person under like or similar circumstances, then he was not guilty of contributory negligence which will bar his recovery."

At the request of the defendant, the court instructed the jury as follows: " 1. If the plaintiff was, at the time he signed the release offered in evidence, capable of knowing what he signed and what was written therein, and did so know, then the settlement in this particular case is absolutely binding, and plaintiff cannot get rid of the release upon this trial. In determining this question as to the release, you have no right to go into the question of whether plaintiff ought or ought not to have received more. If plaintiff knew, and had sufficient capability and comprehension at the time to know, what he was signing, then he is bound by the contract, and you must find a verdict for the defendant. And, in the event that you find he is so bound, then it is wholly immaterial for you to consider any other question in the case. 2. In this case, the mere fact, if it be true, that plaintiff fell from a car and was injured, gives him no right to sue defendant and recover damages. Before, under any circumstances, the plaintiff is entitled to a verdict, the jury must find that his injury was actually caused by the negligence of the defendant, in the manner he has specified it in his petition, and which is by the instructions submitted to your consideration. If his injuries were not actually caused by such specified negligence, then he has no case, and cannot recover, even if he did fall from the train and was injured thereby, and even if the fall was caused by a jerk of the car. But, even if he was injured by such negligence, still he cannot recover, if plaintiff by his own act or conduct negligently contributed to his own injury; nor can he recover if you find for defendant upon the issue as to the release referred to in other instructions. 3. The plaintiff specified in his petition two things as constituting the alleged negligence of the defendant, and, in considering the question whether defendant was negligent, you must be confined to the things so specified. The acts so specified are — First, that defendant negligently permitted the train to become overcrowded, so that plaintiff could not obtain a seat, and he was thereby compelled to stand upon the foot board; and, second, that defendant's gripman negligently caused the car to be jerked so as to throw plaintiff off. If the jury find that the train was not so crowded, but that the plaintiff could have obtained a seat in one of

the cars, if he wanted to, then the first act of negligence so charged by the plaintiff must not be considered. And, unless you further find that plaintiff's fall was caused by negligence of the gripman in running the car with a jerk, then, without more, your verdict must be for the defendant, even though you may believe that plaintiff was thrown to the ground by a jerk of the car. A jerk of the car, if not negligently made by the gripman, gives the plaintiff no right to recover. 4. Even if the car was going at the full speed of the cable rope, and even if there were jerks and jars which caused the plaintiff to fall, still, if such jars and jerks were only such as were necessarily incident to the proper and careful operation of the cable road in its usual and ordinary way, then there was no negligence, and defendant is not liable. 5. Even if you should find that the defendant's gripman was negligent in the matter specified, still plaintiff cannot recover, if he was negligent, and thereby contributed to his own injury. There is a difference between a plaintiff's and a defendant's negligence, in relation to its connection to any injury. The difference is this: Defendant's negligence, if any, must be the cause of the injury, whereas plaintiff's negligence, if any, need not be the cause of the injury, for it defeats a recovery if it but contributes to the injury. And even though defendant's negligence, if any, or anything else, were the cause of the injury, still, if, contributing thereto, there was negligence on plaintiff's part, the verdict must be for the defendant. Or if both parties were negligent, and thereby contributed to the injury, then plaintiff has no case. 6. Plaintiff was bound to exercise reasonable prudence in looking out for himself, and in finding a safe place on the train. If he failed to do so then he was negligent. Forgetfulness, inattention, or any failure to exercise ordinary care, upon plaintiff's part, was negligence; and if, by the exercise of ordinary care upon his part, he would not have fallen from the car, then he has no case, even though you may believe that the defendant's gripman was also negligent, and even though you may believe that he was thrown from the car by a jerk."

There was a verdict for defendant, which, upon motion of plaintiff, the court afterwards set aside, and granted a new trial, "for the reason that the court committed error in giving and refusing to give instructions to the jury on the trial of this cause." The defendant excepted to the action of the court, and appealed the case to this court.

KARNES, HOLMES & KRAUTHOFF and FRANK HAGERMAN, for appellant.

W. J. HOLLIS, for respondent.

MARSHALL, J. (after stating the facts). — 1. The order granting the new trial is in general terms, — “for the reason that the court committed error in giving and refusing to give instructions to the jury on the trial of this cause.” This is a compliance with the letter, but not the spirit or reason, of Rev. St. 1889, sec. 2241. No index is thereby afforded to the error the court believed it had committed. Respondents explanation, however, is that the instructions given for defendant placed the burden of proof upon the plaintiff throughout the whole case; and it is claimed that this is a proper case for the application of the doctrine of imputable negligence to the defendant, and hence the plaintiff’s case having been made out, by showing the accident and the injury, the presumption of negligence attached, and the burden was cast upon defendant to exonerate itself by disproving negligence on its part. If this was the moving cause in the action of the court, it was clearly erroneous; and, if this was not the ground of its action, we are at a loss to understand the reason. The only negligence charged in the petition is that the gripman “so carelessly and negligently operated said grip iron as to cause said car to jerk and lurch with such force that it broke the plaintiff’s hold, and threw him on the paved street with great force.” This is a specific charge of a particular act on the part of the gripman, which was susceptible of positive and direct proof, and excludes any idea of intention of the pleader to rely upon general negligence, but, on the contrary, expressly limits the plaintiff to proof of the specific negligence averred. *Waldhier v. Railroad Co.*, 71 Mo. 514; *Ely v. Railway Co.*, 77 Mo. 34; *Leslie v. Railway Co.*, 88 Mo. 50; *Hite v. Railway Co.*, 130 Mo. 132, 31 S. W. Rep. 262, 32 S. W. Rep. 33; *McManamee v. Railway Co.*, 135 Mo. 440, 37 S. W. Rep. 119. To sustain his allegation of negligence, plaintiff testified that he boarded the grip car, and stood on the running board (although there was at least one vacant seat, beside his friend Watkins, on the car), intending to ride to his destination, the while standing on the running board; that the car came to a full stop just after he had gotten on it, then started, had attained the full speed of the cable rope, and had gone thirty or forty feet (other witnesses say half a block), when “it [the car] kind of stopped, or something, — gave a lurch. I don’t quite understand how it was, but it gave a lurch, or something, the nature of which I don’t understand;” that it was some action of the gripman that caused the jerk, but he could not say positively what it was, — whether it was running faster than the speed of the rope or not, he did not know, but that “he (the gripman) caught the rope with a quick jerk, or made a motion with his grip like as if he was.” The only other witness for

plaintiff who explained the accident was George Price, who was a passenger on the grip car, who said plaintiff got on the car, about the center thereof; that there was a vacant seat behind the witness, and one ahead of him, but plaintiff was walking along the running board, towards a vacant seat near the front of the car, when he fell off; that the car had moved about a half a block after plaintiff boarded it, before he fell off; that he don't know what caused plaintiff to fall off, unless it was "a little kind of sharp jerk;" that the gripman did nothing to make the car jerk, and was not jerking up or tightening upon his grip; that the jerk was not very perceptible; that it was the slack in the rope which caused the jerk; and that there was no other way of accounting for the jerk. This was practically all the evidence adduced by the plaintiff to sustain the issue of carelessness and negligence on the part of the gripman in operating the car. To state it is all that is necessary to conclusively demonstrate that the plaintiff utterly failed to make out a *prima facie* case such as entitled him to go to the jury. Plaintiff's testimony does not rise to the dignity of proof of negligence, for it fails to show what the gripman did, or how he caused the jerk, or that he caused it at all, while the testimony of his witness Price is positive and direct that the gripman did not jerk or tighten the grip, but that the jerk, which was not very perceptible, was caused by the taking up of the slack in the rope. It is a matter of common knowledge, of which even a court is not ignorant, as well as a matter of physics, that the rope of a cable railroad cannot be kept taut, and that the jerks which are common and unavoidable to such roads are caused by the slack in the rope being taken up. In order to recover from a cable railroad, it is not enough to show that there was a jerk, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskillful handling of the car by the gripman. *Adams v. Railroad Co.*, 9 App. D. C. 34; *Weaver v. Railroad Co.*, 3 App. D. C. 436; *Railroad Co. v. Snashall*, Id. 420; *Hayes v. Railroad Co.*, 97 N. Y. 259; *Stager v. Railway Co.*, 119 Pa. St. 70, 12 Atl. Rep. 821; *Mitchell v. Railway Co.*, 51 Mich. 236, 16 N. W. Rep. 388; *Muller v. Railroad Co.*, 48 N. Y., Super. Ct., 546; *Holland v. Railway Co.*, 155 Mass. 387, 29 N. E. Rep. 622; *Stewart v. Railroad Co.*, 146 Mass. 605, 16 N. E. Rep. 466; *Turnpike Road v. Cason*, 72 Md. 377, 20 Atl. Rep. 113. Clearly, the testimony in this case does not show anything extraordinary or unusual in the jerk. No defect in the track or car or apparatus is shown, and no negligence of the gripman is made to appear. It was therefore the duty

of the trial court to so declare, and to sustain the demurrer to the evidence at the close of the plaintiff's case, and it was error on its part not to do so

2. This is practically conceded by respondent in this court, but, to help out, he insists that negligence should be imputed to defendant, and hence he was entitled to go to the jury, although his testimony fell short of making out a *prima facie* case. This contention is not tenable. It is not true that jerks do not usually occur in the running of cable cars, but, on the contrary, it is a fact that they are unavoidable. It is only in cases where the injury would not occur in the ordinary conduct of such affairs that negligence is imputed to a defendant. Where, as here, it affirmatively appears, and is proved by common experience, as well as by the laws of physics, that the particular thing complained of is unavoidable, there can be no negligence.

3. The defendant's testimony established clearly that there was no unusual jar or jerk or lurch; that the gripman was wholly without fault; that plaintiff was walking along the running board, towards the front of the car, although there were plenty of vacant seats that he might have safely taken; that while so walking he missed catching hold of one of the posts or uprights, and fell off. Even if this could be treated as a proper case for the application of the doctrine of imputable negligence, the defendant has completely exonerated itself from blame, and has overcome any possible presumption of negligence, and the verdict of the jury was the only verdict which they could have found, consistently with the evidence, and the only verdict which could have been allowed to stand in the case; and therefore, under the many and uniform decisions of this court, it is wholly immaterial whether the trial court erred in the declarations of law given to the jury or not. *Fitzgerald v. Barker*, 96 Mo. loc. cit. 666, 10 S. W. Rep. 48; *Fox v. Windes*, 127 Mo. loc. cit. 520, 30 S. W. Rep. 326; *Homuth v. Railway Co.*, 129 Mo. loc. cit. 642, 31 S. W. Rep. 906. In the case last cited, Robinson, J., speaking for this court in banc, said: "While this is a suit at law, in which all the issues of fact triable are to be determined by the jury, when the facts, as disclosed by the testimony of plaintiffs themselves, as in this case, entitled them to nothing, or when they admit the existence of the defence as set up by the defendant, the jury have no office to perform. And when the court delegates to the jury a work that it should have done, and in doing so it gave an erroneous instruction, and the jury proceed thereunder, and make a finding for the right party, as the court should have done without them, no error has been committed authorizing the granting of a new trial, 'notwithstanding

the error in the instruction.' It is the settled doctrine of this court that if, upon the pleadings and undisputed facts, the judgment is for the right party, there can be no reversal, no matter what errors intervened upon the trial. *Orth v. Dorschlein*, 32 Mo. 336; *Ellerbe v. Bank*, 109 Mo. 445, 19 S. W. Rep. 241; and others. Then, upon the same principle, if the judgment is for the right party upon the undisputed or admitted facts in the trial court, that court should not disturb the verdict and judgment thereon, notwithstanding error in instructions was made by it. *Kelly v. Railroad Co.*, 88 Mo. 534." Accordingly the judgment of the Circuit Court in awarding a new trial in that case was reversed, and the cause remanded, with directions to enter judgment upon the verdict for defendant. If that opinion had been written upon the facts and pleadings in this case, it could not fit it better than it does. The Circuit Court therefore committed error in granting a new trial in this case.

4. The foregoing conclusions make it unnecessary to consider whether the Circuit Court erred in giving and refusing instructions, and also whether it erred in admitting evidence as to the release having been procured by fraud. It is enough now to say that the verdict of the jury was the only verdict that could properly have been rendered, and that the Circuit Court erred in granting a new trial. For this error the judgment will be reversed, and the cause remanded to that court, with directions to enter a judgment upon the verdict for the defendant. It is so ordered. All concur.

CAMERON V. KENYON-CONNELL COMMERCIAL COMPANY.

Supreme Court, Montana, March, 1899.

ORDINANCE INCONSISTENT WITH STATUTE—STORAGE OF POWDER — EXPLOSION. — An ordinance of a city permitting the storage of powder in a warehouse in quantities exceeding that permitted by a state law will not relieve the warehousemen for liability for death from an explosion.

DIRECTORS OF CORPORATION LIABLE FOR DEATH FROM EXPLOSION OF POWDER IN WAREHOUSE. — The directors of a corporation in whose warehouse an unlawful quantity of powder was stored are personally liable for the death of one killed by an explosion though they had no knowledge of the quantity stored, if by the exercise of ordinary diligence they could have ascertained it, and the burden is on them of showing that they could not have discovered it if they had exercised ordinary diligence.

APPEAL from District Court, Silver Bow County.

Action by Minnie Cameron, as administratrix of Angus D. Cameron, deceased, against Kenyon-Connell Commercial Company, a corporation, and M. J. Connell, W. R. Kenyon, J. E. Gaylord, C. H. Palmer, and W. A. Clark. Motion for nonsuit as to defendants Kenyon, Connell, Palmer, and Gaylord was granted. From an order denying a new trial as to such defendants, plaintiff appeals.

T. J. WALSH and J. W. KINSLEY, for appellant.

WM. H. DE WITT and JOHN F. FORBIS, for respondents.

HUNT, J. — Plaintiff, as administratrix of the estate of Angus D. Cameron, deceased, brought this action against the Kenyon-Connell Commercial Company, a corporation, and M. J. Connell, W. R. Kenyon, J. E. Gaylord, C. H. Palmer, and W. A. Clark, trustees and agents of the corporation, for damages by reason of the killing of Angus D. Cameron, on January 15, 1895, through force of an explosion of giant powder negligently and unlawfully kept by defendant corporation in its warehouse within the limits of the city of Butte. The corporation denied the negligence and unlawful acts averred. Kenyon, Connell, and Palmer each separately answered, and denied any unlawful or negligent act on his part, and each affirmatively pleaded that the warehouse was the property of the corporation, and that he never authorized or directed any powder to be stored therein, and was ignorant of the fact that any powder was stored therein. Gaylord and Clark each denied the allegations of the complaint, or that he was a managing agent or trustee or officer of the corporation. Trial to jury. Motion for nonsuit by individual defendants was granted. Thereafter plaintiff's motion for a new trial as to defendants Kenyon, Connell, Palmer, and Gaylord was overruled. Plaintiff appeals.

The record discloses these facts: The defendant corporation dealt in hardware, merchandise, and powder. It owned a large frame, iron-roofed warehouse, near a railroad depot within the corporate limits of the city of Butte where it kept its merchandise, including Hercules powder, a dangerous explosive compound of nitro-glycerin, and other substances. On the night of January 15, 1895, the warehouse took fire. Plaintiff's intestate, Cameron, was the chief of the fire department of the city of Butte, and commanded the firemen who responded to the alarm. While the firemen were actually engaged in an endeavor to put the fire out, a fearful explosion occurred within the corporation's warehouse, and many persons, including Cameron, were killed. From the beginning of the year 1893, Hercules and giant powder had been kept in the warehouse. Defendants Kenyon and Connell had both been seen in or about the

building during 1893, and at divers times up to the time of the explosion, — Kenyon often, Connell very seldom, the other defendants never. The quantity of powder kept in the warehouse about the 1st of each month was from twenty to fifty boxes, larger quantities being stored in a powder magazine three miles out of the city. On the day before the explosion, a witness saw some seven boxes of powder, fifty pounds in each box, in the warehouse. An employee, one Orcutt, had immediate charge of the warehouse, and ordered the powder put where it was. He said that on the day of the explosion he thought there were somewhere about three to five cases of powder in the warehouse; while another witness, a mining superintendent accustomed to using powder, said he thought a ton must have exploded on the night of the fire. Defendant Connell was president of the corporation. Kenyon was general manager. Kenyon's duties were to give attention to the corporation's business, his particular duties being to look after the financial part, and ordering goods, but not to manage or control the warehouse or magazine, which were under the warehouseman Orcutt's direct charge. Neither Connell, the president, nor any of the other trustees, except Kenyon, had anything whatever to do with the actual personal management of the affairs of the corporation.

It is plain that this corporation, like many others in the commercial world, had one head, — director, — to whom all the other trustees gave the entire practical management of the concern. It thus furnishes but a single instance of the common practice among business men to incorporate commercial enterprises, and, in doing so, of their trusting the entire actual management to the one director who is familiar with, and assumes the real control of, the particular business undertaken. This custom has doubtless been the outgrowth of a belief, generally correct too, that, by incorporating mercantile or other undertakings, directors are not liable to creditors in case of business reverses, while those who associate themselves as members of a partnership are. But, notwithstanding all this, there are various unavoidable responsibilities that attach themselves inseparably to the office of corporate directorship, which, in case of negligence or misconduct, often illustrate the risks incidental to accepting such positions of trust in a corporation, and of not prudently guarding against their possible consequences. It is a general rule that the ordinary business of a corporation is managed in the name and on behalf of the corporation by particular agents, chosen by the stockholders. These agents are the directors. For their acts, performed within the apparent scope of their authority, the corporation is responsible, while, *e converso*, the corporation

can act through these agents alone. These principles are generally familiar to business men, as well as to lawyers. They control the relation of the artificial being, the corporation, to the world at large. They find their foundation in the law of agency, which makes the corporation the principal. Still, they are extended, under certain conditions, far enough to inculcate the agents or directors of the corporation, notwithstanding the fact that the principal may also be liable for a wrong done.

Now, bearing in mind that this case presents itself upon a motion for a nonsuit, and that we must accordingly consider as true everything which the evidence tended to prove on the trial, we have before us a corporation guilty of a nuisance, by having kept in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of Hercules powder in excess of the quantity — fifty pounds — allowed to be stored therein by the laws of the State. *Laws Mont. Ex. Sess. 1887, p. 68; Comp. St. 1887, sec. 361; Cheatham v. Shearon, 1 Swan, 213.* It is very hard to conceive of anything more terrible in its danger to life and property than a quantity of highly-explosive powder kept near to where people live or do business. Such a menace, when known, obstructs that free use of property which the law assures to an owner; while nothing could more seriously interfere with the comfortable enjoyment of life than the knowledge that in one's neighborhood there is a frame building in which nitro-glycerin explosives are stored in large quantities. No ordinance of a city could authorize a larger quantity of powder to be kept by a corporation within the city limits than the State statute allows, unless some special exception is to be found exempting the inhabitants of such city from the operation of the general statute. None such affecting Butte is known to us, however; so we must regard the ordinance of that city, pleaded by defendants, which permits 150 pounds of powder to be kept at one time by a company in its warehouse within the limits of that city, as inconsistent with the State law, without force, and immaterial to the case before us. The corporation, therefore, by maintaining this nuisance, became the subject of indictment for misdemeanor (*Whart. Cr. Law, sec. 91*), as well as liable in civil action for injury to person or property caused by the nuisance (*Heeg v. Licht, 80 N. Y. 579*). These propositions are too plain for extended comment. They demonstrate a liability to this plaintiff, assuming always the evidence is uncontradicted. Hence we pass to the more direct inquiry whether the directors of the guilty corporation are also liable for Cameron's death.

As said before, the trustees manage the stock, property, and

concerns of a corporation (Comp. St. div. 5, sec. 450); wherefore it is difficult to see how all responsibility in this management can be avoided as long as the trustees hold their offices. Certainly, the ministerial work of a corporation may be delegated to subordinate agents, and often must be. The details of a corporation's business necessitates this; and if directors act in good faith, and with reasonable care and diligence in appointing and supervising such inferior agents, they are not personally responsible for damages occasioned by the agents' negligence, or even crimes. *Thomp. Corp. sec. 4107*. But a director cannot wholly escape his duty of supervision or transfer his authority to represent his principal, at least without the principal's consent; otherwise, he could evade every responsibility imposed by law upon him by simply absenting himself from meetings, or by avoiding information of the acts of the other directors in expressing the will of the corporation, or by delegating an employee to act as trustee for him. *Morawetz on Private Corporations*, in section 536, says: "The general supervision and direction of the affairs of a corporation are especially intrusted by the shareholders to the board of directors. It is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied. Thus, the directors of a company have no implied authority to enter into a contract with a creditor by which the entire management of the company's affairs is placed in his control until the debt has been paid."

Third persons may hold directors liable in positive tort, upon the principle that a positive wrong done by a servant or ordinary agent must be applied to the misfeasance of directors also. *Salmon v. Richardson*, 30 Conn. 360. Persons having in their custody gunpowder or other instruments of danger should keep them with the utmost care. "The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, * * * is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required; but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exceptions) where unsuccessful diligence on the defendant's part was held to exonerate him." *Webb, Pol. Torts*, p. 615. A company charged with an obligation of this nature cannot devolve it upon another in a manner so as to exonerate the company from a liability for an injury caused to a third person by the negligent way in which the

duty pertaining to the care of giant powder or other dangerous explosives may be executed. In tort, the relation of principal and agent cannot relieve the wrongdoer. *Berghoff v. McDonald*, 87 Ind. 559.

It is unnecessary to consider the rule which relieves the master from liability for his servant's acts, where the servant does something outside of his employment, for that is not involved. But the case does present facts to which this principle fits; that whatever the servant is intrusted by the master to do for him must be performed with a like degree of care which the law holds the master to were he acting for himself. We apply this principle for the reason that there is a presumption that the trustees of a trading corporation know of the principal articles in which their company deals, and whether or not such articles are highly dangerous to life and property. It is therefore the duty of the trustees of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part of the subordinates who direct or handle the explosives. This rule grows out of "the great principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49. It is likewise their duty to avoid the creation of nuisances by their corporation, through its employees acting within the line of their duties.

Nor will inaction by itself overthrow the force of this obligation upon trustees to so control their corporation's business as to not negligently injure third persons. Along with the assumption of the duties of trusteeship go the duties of exercising reasonable care in the manner of performing those duties. This reasonable care appears not to have been exercised in this case, where the corporation, by its trustees, permitted a public nuisance to be created, and to continue, whereby, as a consequence of the act of permitting it, a third person, not in fault, has been killed. Because directors are themselves agents, it is none the less true that they owe a common-law duty to third persons. If they violate that duty, they are responsible, whether the violation is the result of a wrongful omission or commission. *Mechem*, Ag. sec. 572. Were the rule such that wrongful commission alone meant liability, as before indicated, directors' statutory duties to manage would be sufficiently performed by absence; and, the denser the ignorance on a director's part of the business of his concern, the more certain his exoneration from liability for the tortious acts of the

company's employees. Such a rule would be unhealthy and unsound. The liability of a director in tort is not to be avoided by his "vicarious character," where the tort of the corporation has been committed through the directors. *Nunnally v. Iron Co.* (Tenn. Sup.) 28 L. R. A. 421 (s. c. 29 S. W. Rep. 361); *Bank v. Byers*, 139 Mo. 627, 41 S. W. Rep. 325; *Delaney v. Rochereau*, 34 La. Ann. 1123. Relationship of contract to a corporation neither adds to nor subtracts from a man's duty to strangers to so use his own property, or that under his control, as not to injure another. *Baird v. Shipman* (Ill. Sup.) 23 N. E. Rep. 384; Riche's note to *Nunnally v. Iron Co.*, *supra*; *Jenne v. Sutton*, 43 N. J. Law, 257; *Mayer v. Building Co.* (Ala.) 16 Southern Rep. 620. Eminent judges have drawn distinctions between a trustee's liability for misfeasance, malfeasance, and nonfeasance. *Bell v. Josselyn*, 3 Gray, 309. But they are of no vital importance on this appeal. Nevertheless, reasoning upon these distinctions, defendants have argued that they are liable, if at all, to the corporation only, inasmuch as the record shows nonfeasance merely, or non-execution of the duties of their directorships. This argument seems to overlook the proposition that directors are charged with the affirmative duty of knowing something of the management of their company's business, and of exercising reasonable supervision of its management. Management usually signifies positive, rather than negative, conduct.

As a matter of defense, it is proper to show all facts by which the jury can say whether the inaction or ignorance relied on is a sufficient excuse for the wrong done. But we have no hesitation in saying that, upon a state of facts like that before us, nonexecution which resulted in the positive act of a creation and maintenance of a continuing nuisance on account of which a third person was killed amounts, unless explained, to misfeasance upon the part of all the directors of the company, except as to Kenyon, who, it appears *prima facie*, must have actually known of and authorized the nuisance. As to him it was malfeasance. A director who knew nothing of the nuisance, and who could not, by exercising ordinary diligence in control, have known of it, or, generally speaking, one who, considering the situation and all the attendant circumstances, has performed his duty of taking care, is not liable, and cannot be held so. In this case the defense must show this though, for a *prima facie* case is made by plaintiff. Due care involves several elements relative to the circumstances of the case. Ordinary care, for instance, on the part of a corporation that deals in hardware would not prevent the storage of large quantities of nails in a frame warehouse in the middle of a city. The dangers

from doing so would be slight, even in case of fire or lightning; but such a practice with giant powder or nitro-glycerin would be negligence, fraught with imminent peril to life and property. We said, in considering the law of negligence in a boiler explosion case (*Johnson v. Mining Co.*, 16 Mont. 175, 40 Pac. Rep. 301): "Familiar underlying principles, evolved from generations of experience and thought, are to be applied to the peculiar phases presented by the facts and circumstances of the particular case under investigation. And so we find that the opinions, in discussing the definition of 'ordinary care,' recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised." In *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, the court, in very clear language, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

After all, therefore, the question of the personal liability of the affairs of this corporation for the negligence which resulted in Cameron's death, resolves itself into whether or not they exercised reasonable diligence in the control and supervision in their management of the corporation's business, or whether they were negligent in doing or not doing so, under all the circumstances of the case.

The case must be reversed and remanded for a new trial. It is so ordered. Reversed and remanded.

BRANTLY, Ch. J., and PIGOTT, J., concur.

**BENJAMIN ATHA AND ILLINGWORTH
COMPANY v. COSTELLO.**

Supreme Court, New Jersey, March, 1899.

MASTER AND SERVANT — RISK OF EMPLOYMENT — INSTRUCTION.—

1. An employee assumes a risk of such dangers attending the prosecution of his work as he would discover by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers the employer is not responsible.
2. A charge which, by the fair import of its language, confines the obvious dangers, of which an employee assumes the risk, to the dangers arising from facts known to him, does not properly embody the rule above stated.
(Syllabus by the Court.)

FROM a judgment of Circuit Court, Essex County, in favor of plaintiff, defendant brings error.

EDWARD M. COLIE, for plaintiffs in error.

S. KALISCH, for defendant in error.

DIXON, J. — The plaintiff, while in the employ of the defendants, and working in their shop, was injured by a plank that fell on him from the girders of the roof. The plank, with others, had been laid on the girders as a scaffold for men engaged in painting. The painting had been finished some days before the accident, and the negligence charged against the defendants was that they had permitted the planks to remain upon the girders unfastened, and liable to be shaken from their position by the jarring of the building, incident to the heavy work done in the shop. The plaintiff knew that the planks were there, and that the building was jarred by the work; but it was open to question whether he knew, or ought to have known, that the planks were not fastened.

In this state of the evidence, the defendant's counsel requested the court to charge the jury that the plaintiff was chargeable with notice of every fact which he would have known, had he exercised ordinary care to keep himself informed as to the matters concerning which it was his duty to inquire, and that, if the position of the plank over his head was such that, under all the circumstances of the situation, the plaintiff ought to have known it was likely to fall, he could not recover. As a response to these requests, the court charged that, when the plaintiff entered the service of the defendants, he assumed the risk of all obvious dangers, and risks arising in consequence of special features of danger known to him, and that if he knew the plank was over his head, and was not secured in any way,

then it was an obvious danger, and he would be barred from recovery. He further charged that if the jury found that the danger incident to the plank was a risk arising in consequence of a special feature of danger, and that that special feature of danger was not known to the plaintiff, — was not plain and obvious, — then the remaining question would be, has the plaintiff established a right of recovery against the defendant company? The requests mentioned embodied a settled rule of law, pertinent to the matters in issue; for there can be no doubt than an employee assumes the risk of such dangers attending the prosecution of his work as he would discover by the exercise of ordinary care for his personal safety, and that for hurt happening to him from those dangers, the employer is not responsible. *Telegraph Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. Rep. 384; *Comben v. Stone Co.*, 59 N. J. Law, 226, 1 Am. Neg. Rep. 117, 36 Atl. Rep. 473.

The charge seems to us to be not a fair compliance with the requests. The charge dealt with facts known to the plaintiff. The requests dealt with facts which he ought to have known, — which he would have known had he exercised ordinary care to keep himself informed as to the matters concerning which it was his duty to inquire, viz., his personal safety while engaged in his work. The distinction between the facts known to a person, and those which would become known to him if he exercised ordinary care, involves a question of negligence, and, when applied to the relation of master and servant, involves a question of legal responsibility. The conduct of an employee, tested by the facts known to him, may disclose no negligence, and no legal assumption of risk; while the same conduct, tested by the facts which ordinary care would have revealed to him, may appear negligent, or show that in law he assumed the risk of injury. Either of these conclusions would secure immunity to the master. While the charge that the plaintiff assumed the risk of all obvious dangers might, if it had been left without modification, have sufficiently expressed the true rule, yet it was not so left; for, when the learned judge came to apply it to the facts of the case, he confined it, by the reasonable import of his language, to those dangers which the plaintiff's actual knowledge would indicate.

On this assignment of error the judgment should be reversed, and the record remitted for a new trial.

NEW YORK AND NEW JERSEY TELEPHONE COMPANY v. BENNETT.

Court of Errors and Appeals, New Jersey, March, 1899.

INJURED BY PICKING UP LIVE ELECTRIC WIRE LYING IN THE STREET. — The plaintiff picked up a wire that was lying in a public highway, and was injured by an electric current (1). He brought suit against the telephone company, whose wire it was, and against the trolley company, whose current, it was contended, did the harm. *Held:*

1. That the question whether the linemen of the telephone company had been reasonably diligent in discovering the fallen wire, and in preventing probable injury, was properly left to the jury. Also, that:
2. Whether the failure of the trolley company to use guard wires was negligence by which the plaintiff was injured was for the jury.
3. Testimony that a witness had certain uses of his hand after an accident somewhat similar to the plaintiff's was properly excluded.
4. If the plaintiff used reasonable care in the selection of a reputable physician to cure his injury, he cannot be kept out of damages because with a better physician he would have had better results.

(Syllabus by the Court.)

ERROR to Supreme Court. From a judgment in favor of plaintiff, defendant brings error.

FLAVEL MCGEE, for plaintiff in error NEW YORK & N. J. TEL. CO.
CHARLES L. CORBIN, for plaintiff in error ATLANTIC HIGHLANDS,
R. B. & L. B. ELECTRIC RY. CO.

EDMUND WILSON, for defendant in error.

GARRISON, J. — The plaintiff, a countryman, who had driven into the town of Red Bank, stopped his horse near a drinking fountain that stood at the intersection of Front and Broad streets; and in order to remove some wire that lay in the street, between the horse and the fountain, picked it up, and received through it a powerful electric current, that inflicted permanent injuries, for which he brought suit against the New York and New Jersey Telephone Company, whose wire it was, and against the Atlantic Highlands, Red Bank and Long Branch Electric Railway Company, whose current it was contended, did the harm.

The defendants were each maintaining wires in a public highway, in the exercise of franchise, not of an easement. Hence each was bound to take reasonable care not to injure other users of the streets. *Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. Rep.

1. See NOTE OF CASES ON INJURIES FROM CONTACT WITH ELECTRIC WIRES, pp. 402-403, *ante*, and other cases on the subject in this volume of AM. NEG. REP.

1069; *Railway Co. v. Bennett*, 60 N. J. Law, 219, 3 Am. Neg. Rep. 55, 37 Atl. Rep. 730.

One factor in the measure of reasonable care is the probable result of negligence. In the use of a powerful electric current in the public streets, reasonable care is great care.

If it was the duty of the telephone company to use reasonable care to prevent its wires, which were comparatively harmless, from coming in contact with naked wires that carried a powerful electric current, and if it was the duty of the trolley company using such powerful current to protect its naked wires from such contact by the use of a degree of care reasonably proportionate to the probable results, neither of these defendants has any just ground to complain of the charge of the trial court.

For by its charge the court did not permit the jury to hold either of the defendants to so strict an account in its use of the public streets. On the contrary, in respect to each its liability was limited to a single act of alleged negligence, upon which there was proof *pro* and *con*. Against the trolley company the plaintiff was permitted to recover only in case he established that its failure to use guard wires was negligence by which he was injured; and, in regard to the telephone company, the right to a recovery was confined to the single question of the reasonable diligence of its employees in discovering the fallen wire, and in preventing the probable results. As propositions of law, neither defendant can complain of the submission of these issues to the jury, unless there was in the case no testimony competent to the establishment of the affirmative propositions of fact involved. That there was with respect to the use of the guard wires such testimony appears from the summing up of the trial justice, which accurately shows the state of the evidence upon this point: "Experts in electricity and electric railways have been called on both sides. On the part of the plaintiff it is claimed by this expert testimony that the prudent management of an electric railway requires, and that it is usual in such management, to have a guard wire or guard wires under such circumstances. On the part of the defendant railway company the expert testimony is that it is not prudent to have such guard wires, or, rather, to put it differently, that proper prudence does not exact it; that there is a balancing of dangers; that, on the one hand, you consider the constant danger that may come from such a wire being liable to be pulled down, and especially at curves, and, on the other hand, the more or less infrequent danger of an overhead wire falling across the trolley wire; and that, while in the early history of electric railway guard wires were usual, their use had at the time of this accident been in many

places abandoned. As I understand the few adjudged cases there are on this subject, it is a matter that must be left to you to determine, as to what prudence required at this particular place; having regard to all the circumstances, and with reference to the danger of one of the telephone wires falling upon the trolley wire." The submission of this question to the jury was clearly not erroneous.

Upon the question whether the conduct of the linemen of the telephone company showed reasonable care, there was likewise testimony upon which the verdict may legally rest. Several witnesses spoke of the interval of time that elapsed between the falling of the wire before it burned off, and between its burning off and the accident to the plaintiff; estimating each period at from two to four or five minutes. During these periods occurred the episode of the horse that became entangled in the wire. There was testimony, also, as to the attitude of the linemen during these periods, and that they had to be sent for before they came to the plaintiff's relief. As this is not a rule to show cause, it is immaterial whether the employees of the telephone company contradict this testimony, or whether their version of the occurrence would absolve them from negligence. The question was a proper one to be left to a jury. It was properly submitted, and there was testimony that, if believed by the jury, established the negligence of the telephone company. The case turns upon the above propositions of fact, and not upon the application to them of any principle of law that is not thoroughly established.

The contributory negligence of the plaintiff was likewise a jury question, pure and simple. How much a countryman would know about the danger of picking up a wire in the streets of a town, what inferences he ought to have drawn from what he saw, and whether, on the whole, his conduct showed less than reasonable caution, were entirely within the domain of fact. Stress was laid upon the circumstances that he had seen the horse that became entangled in the wire; but that affair was susceptible of two inferences, one of which was that the horse was scared by the mere contact with the wire, not by the transmission of an electric current.

Two questions to which objection was made by the telephone company were allowed by the trial justice, upon which error has been assigned: First, whether the plaintiff, in going with his horse direct to the fountain, would have come in contact with the wire. This inquiry was proper. It bore upon the reasonableness of the plaintiff's conduct in removing the wire. The other question was whether the linemen were still up the poles when the plaintiff came in contact with the wire. This bore upon the conduct of the defendant's servants, and was properly admitted. A number of

questions that were put by the telephone company and overruled have become of no moment, for the reason that they concerned matters upon which the liability of the defendant was not permitted to turn. Finally, upon the question of damages the court below was clearly right in excluding the testimony of a witness called to see how much use he had of his hand after an accident somewhat similar to the plaintiff's. Neither was there any error in the charge that, if the plaintiff had employed a responsible and reputable physician, he (the plaintiff) had a right to assume that the treatment was proper, and could not be kept out of damages because with a better physician he might have had better results. If he used reasonable care to select a reputable doctor, it was enough.

There is in the case no error for which the judgment should be disturbed.

WELSH v. WEST JERSEY AND SEASHORE RAILROAD COMPANY.

Court of Errors and Appeals, New Jersey, March, 1899.

AUTHORITY OF BRAKEMAN TO EJECT TRESPASSER FROM TRAIN — LIABILITY OF COMPANY FOR USE OF EXCESSIVE FORCE. — 1. A servant has implied authority to do what is necessary for the protection of his master's property which is intrusted to him, or for fulfilling the duty which he has to perform for the master.

2. A brakeman in the employ of a railroad company, and one of a crew in charge of a freight train of the company, has implied authority to eject a passenger from the train.
3. The inference of implied authority arising from the brakeman's employment, from his custody of the company's property, and from the duty owed to the master in respect to the train, will not be overcome by proof that the instructions of the company to its servants expressly required freight conductors not to permit unauthorized persons to ride upon freight trains.
4. The company will be liable for an injury to a person who was a trespasser on its freight train, occasioned by the use of excessive or inappropriate force by a brakeman in ejecting him from the train (1).

Depue, Gummere, Lippincott, Adams, Hendrickson, and Nixon, JJ., dissenting. (Syllabus by the Court.)

1. For actions relating to EJECTION OF PASSENGERS FROM TRAINS ETC., decided in the highest courts of the several States and territories, and in the Federal courts, from the earliest period to 1896, see vol. 8 AM. NEG. CAS.,

where the cases are chronologically grouped and arranged in alphabetical order of states. For subsequent actions, see vols 1-5 AM. NEG. REP., and the current numbers of that series of Reports.

ERROR to Supreme Court. From a judgment for plaintiff, defendant brings error.

JOSEPH H. GASKILL, for plaintiff in error.

HOWARD CARROW, for defendant in error.

MAGIE, Ch. J. — The record returned with this writ of error discloses an action of tort by Welsh (an infant suing by a next friend), who is the defendant in error, against the West Jersey and Seashore Railroad Company, which is the plaintiff in error. The declaration charged that the company, by its servants, assaulted Welsh while riding on a freight train of the company, and willfully and maliciously threw him from the train while it was in motion, whereby he was injured. The plea was the general issue. The case was tried in the Camden circuit, and resulted in a verdict for Welsh, on which judgment has been entered in the Supreme Court. The action shown by the pleadings was against a corporation for an assault and battery committed by it, by its servants. The bills of exceptions show that, at the close of the evidence for Welsh, it plainly appeared that he was a trespasser upon the freight train in question, having got on it, for the purpose of stealing a ride, without right or permission. But the jury could also find that a person in the employ of the company, and one of those in charge of the freight train, and either a conductor or brakeman, kicked Welsh off the train while it was in motion, and that serious injury to him resulted therefrom.

At the close of Welsh's evidence a motion to nonsuit was made and denied, and an exception was allowed and sealed to the denial, which is made the ground of one of the assignments of error. The motion to nonsuit was pressed upon the ground that, to make out the action shown in the declaration, the evidence must satisfactorily establish that the act which occasioned Welsh's injury was done by the authority of the company, either expressed or implied, and the contention was that, there being no evidence of express authority, there was no justifiable inference from the evidence that the servant, — whether conductor or brakeman, — in ejecting Welsh from the train, had implied authority so to do. At the close of Welsh's case the only evidence from which an implication of such authority could be claimed was that the person who kicked him off the train was an employee of the company, and one of those in charge of the train. But, after the refusal to nonsuit, the company proceeded to call witnesses, and their evidence appears in the bills of exception. From that evidence it appears that the train in question was in charge of a freight conductor and several brakemen, and that whatever was done to Welsh must have been done by a brakeman named Selah. It was also made to appear that it was customary for such

conductors and brakemen to exclude from freight trains persons attempting to ride thereon, and to expel them from the trains, if they had intruded thereon. All pertinent evidence exhibited in the bills of exception must be considered, in reviewing the denial of a motion to nonsuit; for if, when made, there was a failure of proof in some respect, and the defect was supplied in the evidence afterwards adduced, the error of the refusal will not lead to a reversal of the judgment. *Railroad Co. v. Dailey*, 37 N. J. Law, 526; *May v. Railway Co.*, 49 N. J. Law, 445, 9 Atl. Rep. 688; *Association v. Warren*, 55 N. J. Law, 598, 26 Atl. Rep. 140.

In the argument in the trial court and here, the contention that the evidence in this case did not justify the inference that the servant of the company had authority to eject Welsh from the train was deemed to be supported by the authority of our Supreme Court in *Brokaw v. Transportation Co.*, 32 N. J. Law, 328. But this involves a misconception of what was decided in that case. The question there considered arose upon a demurrer to a declaration charging a corporation with assault and battery, substantially identical with the declaration contained in the record before us. It was decided that an action for assault and battery would lie against a corporation, and that a demurrer to a charge that a corporation committed assault and battery by a specified servant admitted that such servant had competent authority from the corporation. Questions involving analogous principles have been considered in our courts, and it is now thoroughly settled, here as elsewhere, that corporations are liable for torts which they may commit by agents, and that the pertinent inquiries, when such liability is charged, are 1, whether the act in question is one within the scope of the corporate powers, and 2, whether it was done by a person who was the agent of the corporation in doing it. *McDermott v. Association*, 43 N. J. Law, 488, 44 N. J. Law, 430; *Publishing Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. Rep. 1053; *Dock v. Manufacturing Co.*, 34 N. J. Law, 312. Upon the case presented by the evidence, it is obvious that the company had the right to remove from its freight train Welsh, who was a trespasser thereon, which right grew out of its corporate authority to manage and run such trains. As it could only eject such a trespasser by agents, it could lawfully employ such agents for that purpose. The company could intrust the ejection of such a trespasser to one or more of its servants by a particular direction in a particular case, or by general instructions respecting a class of trespassers. Authority thus expressly given would charge the company with liability for the act of a servant in ejecting a person not a trespasser, or in using excessive or inappropriate force in removing one

who was a trespasser; and this notwithstanding the authority conferred was limited to the removal of trespassers, and the use of any but reasonable and necessary force was prohibited. The responsibility of the corporation is that of a master, who, under the maxim, "*Respondeat superior*," must answer for injuries done by acts of his servant in the prosecution of his business within the scope of his employment. *Driscoll v. Carlin*, 50 N. J. Law, 28, 11 Atl. Rep. 482.

Authority which could thus be expressly conferred upon a servant may, no doubt, be implied to have been conferred from the nature and circumstances of his employment. The inference of implied authority thus arising, it is obvious that it is difficult, if not impossible, to formulate rules upon the sufficiency of evidence to establish such authority. In general, it may be said that, when the act which occasioned the injury for which the master is sought to be charged is shown to have been done by the servant in the course and within the scope of his employment, then the implied authority is inferable. *Aycrigg's Ex'rs v. Railroad Co.*, 30 N. J. Law, 460. This rule solved most of the questions arising in such cases. But, when we are required to determine what evidence will establish implied authority to a servant to make use of force and violence upon the person of another, a more difficult question is presented, and one not easy of solution. I have found no more satisfactory statement of the principle to be applied to the solution of such a question than that enunciated by Mr. Justice Blackburn in delivering his judgment in *Allen v. Railroad Co.*, L. R. 6 Q. B. 65 (1). In that case the plaintiff had been arrested, at the instance of a booking clerk of the defendant, upon the charge that he had attempted to rob the till at the defendant's station where that clerk was in charge. The charge against plaintiff was heard by a magistrate and dismissed. His action against the defendant company was for assault and false imprisonment, and the question before the queen's bench was whether the act of the booking clerk was within an implied authority of the company, for which it was liable. The principle which the learned justice declared was this, viz.: That implied authority in a servant would be inferred to do all those things that were necessary

1 In *Allen v. London & Southwestern R'y Co.*, L. R. 6 Q. B. 65 (Court of Queens Bench, November, 1870), an action for assault and false imprisonment it was held that a clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and receive the money, and keep it in a till under his charge, has no im-

plied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property. *Held*, therefore, that the company was not liable for the act of the clerk.

for the protection of the property intrusted to him, or for fulfilling the duty which he has to perform. From that principle applied to the case, he held that the defendant company would have been liable, if the arrest had been made to prevent the plaintiff from stealing the money of the company from the till in charge of the clerk, or to recover from the plaintiff money actually stolen therefrom. But he also held (and in this he was supported by the other judges who heard the case) that no implied authority from the company was disclosed by the evidence to take into custody a person who had unsuccessfully attempted to rob the till, as that act was unnecessary for the protection or recovery of the property of the company which the clerk had in charge. *Poulton v. Railroad Co.*, L. R. 2 Q. B. 534 (1); *Goff v. Railway Co.*, 3 El. & El. 672 (2); *Roe v. Railroad*

1. In *Poulton v. London & South-western R'y Co.*, L. R. 2 Q. B. 534 (Court of Queen's Bench, June, 1867), it appeared that the plaintiff, having taken a horse to an agricultural show by the defendant's railway, was entitled under arrangements advertised by the defendants to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff having taken a ticket for himself proceeded by the same train. At the end of the journey the stationmaster demanded payment for the horse, and the plaintiff, refusing to pay, was detained in custody by two policemen under the orders of the stationmaster, until it was ascertained by telegraph that all was right. An action having been brought against defendants for false imprisonment, it was held that a railway company has power to apprehend a person traveling on the railway without having paid his own fare, but has power only to detain the goods for nonpayment of the carriage; consequently, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the

station master to detain the plaintiff on this assumption, and they were, therefore, not liable for the act of the stationmaster.

Among other cases, that of *Goff v. Great Northern R'y Co.*, 3 El. & El. 672, was distinguished, an abstract of which case appears in the note following this, which compare.

2. In *Goff v. Great Northern R'y Co.*, 3 El. & El. 672 (Hilary Vacation, Queen's Bench, February, 1861), an action against the railway company for false imprisonment of plaintiff on an unfounded charge under the statute (8 Vict., c. 20, §§ 103, 104), the evidence for the plaintiff showed that he, having traveled on defendant's line with a return ticket from London to Wood Green, and back, at the end of the return journey gave up to defendant's ticket collector at the London station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendant's paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the

Co., 7 Eng. Law & Eq. 546 (1). I am prepared to adopt, and apply to the present case, the principle laid down by Mr. Justice Blackburn. Looking at the evidence, we find that the company had intrusted their property (the freight train) to the custody and care of its servants (the conductor and brakemen). Those servants were in charge of the property, conducting it to its destination. It was not a train for passengers who might claim a right to ride upon paying fare. Whoever entered the train to steal a ride was a trespasser,

inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendant's pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, upon plaintiff's story proving true, dismissed the complaint. *Held*, that the conduct of all defendant's other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff.

The Railway Clauses Act, 1845, (8 Vict., c. 20, §§ 103, 104), imposes a penalty on any person traveling on a railway without having paid his fare, with intent to avoid payment thereof; and empowers all officers and servants on behalf of the company to apprehend such person until he can conveniently be taken before a justice.

1. The facts in *Roe v. Birkenhead, Lancashire & Cheshire Junction R'y Co.*, 7 Eng. Law & Eq. 546, 24 L. J. N. S. Exch. 9 (Court of Exchequer, November, 1851), were as follows: The plaintiff, having seen an advertisement of an excursion train from Monk's Ferry to Bangor and back, inquired of the clerk at the Monk's Ferry station, which belonged to the defendants, as to the return of the train, and was informed that he could return that day

by the 7:30 p. m. train. The plaintiff then took a ticket, proceeded to Bangor, and returning thence by train at the time appointed arrived at Chester, where the train stopped. The Chester station was used by the defendants and other railway companies. A railway servant, who had charge of the train, took the plaintiff's ticket, and informing him that he ought not to have gone by that train, demanded two shillings and sixpence more. Payment being refused, the railway servant and the superintendent took the plaintiff into custody. The plaintiff's attorney having written to the secretary of the defendants' company, asking for compensation, received an answer from the secretary, requesting that he might be furnished with the date of the transaction and promising to make inquiries. The secretary also stated verbally that it was an awkward business, that the blame would fall upon the station clerk at the Monk's Ferry station, who gave the plaintiff the false information, and he also offered to return the two shillings and sixpence. *Quære*: Whether there was evidence for the jury of the railway servant, who made the arrest, being a servant of the defendants. But *held*, that, at all events, there being no proof of the defendants having the power of arresting the plaintiff, there was no evidence of their having expressly or impliedly authorized or ratified the arrest made by the railway servant, and therefore that they were not liable for his tortious act.

whom the company could eject. It was customary for such servants of the company to exclude and eject such trespassers from such trains. This evidence justifies the inference that implied authority was conferred on such servants to eject such a trespasser as Welsh for the protection of the property intrusted to them, and for fulfilling the duty to their employer. This result is, in my judgment, confirmed by a consideration of the liability of Selah, the brakeman, for such an act. Suppose the train had been at a standstill, and that Selah, without unnecessary force, had removed Welsh therefrom; I do not think it admits of a doubt that Selah could have justified his act, in a suit against him by Welsh for assault and battery, without proof of any express authority from the company to expel intruders from freight trains, but solely by the authority defined and implied from his custody of the property and his duty to his employer. From this it follows that there was no injurious error in the refusal to nonsuit.

The bills of exception show that thereafter the company introduced in evidence its printed instructions to its freight conductors and brakemen respecting their duties. It thereby appeared that a freight conductor was charged with responsibility for the vigilance and conduct of the men employed on the train, and was required, among other things, "not to permit unauthorized persons to enter the cars, or handle freight, or ride upon the train." Brakemen were therein instructed that when on duty they were under the direction of the conductor, and required, among other things, to assist him in all things necessary for the safe and prompt movement of the train. There was nothing therein giving authority to the brakemen in respect to unauthorized persons riding upon such trains; nor was authority in respect thereto interdicted to them, unless that resulted from the express grant of authority to the conductor. At the close of the case the company did not ask a direction for a verdict, but submitted many requests to charge. From these we may fairly discover that the trial judge was asked to submit to the jury the question whether, upon the whole evidence, it appeared that authority to remove trespassers from freight trains had been conferred upon Selah, the brakeman. The charge of the trial judge assumed that the right of the company to remove such trespassers had been conferred upon, and could be exercised by, any of the employees on the freight train. It was left to the jury to determine whether Selah's act was done in the exercise of his employment, or from a malicious, personal motive, arising from a bad heart, and anger at Welsh, apart and distinct from his duty to his employer. There was a refusal to charge the requests, otherwise than charged, an exception thereto,

and error has been assigned thereon. It is now contended that there was error in the refusal to charge the request above specified, on the ground that the instructions introduced in evidence, properly construed, gave express authority to freight conductors to exclude from freight trains unauthorized persons riding thereon, and to expel and remove such persons, and that such express authority was exclusive in him on whom it was conferred, and implied an interdiction of its exercise by others; and it is argued that the evidence from which, as we have seen, we think an inference of implied authority in the brakeman could be drawn, was thereby contradicted and overcome by proof that such authority was in fact withheld from such employees. That the instructions to the freight conductors gave them authority to remove any unauthorized person riding on a freight train seems not capable of doubt, and such was the view taken of such instructions in *Holmes v. Wakefield*, 12 Allen, 580 (1). But the contention that the express grant of authority to the conductor interdicts the brakemen from the exercise of a similar authority implied from their employment, and so overcomes evidence of such implied authority, is not, in my judgment, to be acceded to. It is ingeniously argued that the exercise of the power of the company to remove trespassers from its trains is of a delicate and responsible character. The servant to whom such authority is given must determine who are trespassers, and in expelling trespassers he must take care to use only such force as is not excessive in degree or inappropriate in kind. Mistakes by the servant in these respects will render his master liable, and for this reason the employer may well desire to commit this nice duty to a competent and proper person. It must also be conceded that no question of estoppel arises, as might be the case upon a contract made with an agent clothed with apparent authority. The question is as to express or implied authority to do an act in respect to Welsh, with whom the company had no contract relation, and to whom it owed no duty, except to refrain from willful injury. Nor is there any question here of the duty arising from the relation of passenger and carrier, which this court has lately considered. The distinction between the liability for a breach of that duty, and the liability of a master for his servant's acts, is pointed out in the able opinion of Mr. Justice Depue in *Haver v. Railroad Co.* (N. J. Err. & App.) 5 Am. Neg. Rep. 197, 41 Atl. Rep. 916. But, notwithstanding these considerations, I find myself unable to concede that the authority to remove trespassers from freight trains, which, as we have seen, is implied to have been conferred on those put in

1. See note of this case in NOTES OF MASSACHUSETTS CASES RELATING TO ASSAULTS UPON AND EJECTION OF PASSENGERS, ETC., in 8 Am. Neg. Cas. 416.

charge of such trains, has been either abrogated or annulled by the instructions which gave express authority to that effect to the freight conductor. If he had acted under that authority, the liability of the company would not have been in any respect diminished by its conditioning its grant of authority upon its being properly exercised. So, when the company committed to the conductor and his crew of brakemen the custody and care of its freight train, and thereby gave implied power to exclude and expel therefrom any unauthorized persons intruding therein in contravention of the design and purpose of the company in running such a train, I think that the implication is not rebutted by proof that it had selected one of its servants, and given him express authority in respect to such trespassers. The express grant is not inconsistent with the implied authority. The illustration heretofore used is again pertinent. Suppose Selah had removed Welsh from the train when it was not in motion, and without excessive force; can it be doubted that he could have justified his act, in defense of an action for assault and battery, upon his implied authority to protect his master's property, and that his justification would not be negatived by proof that the company had given express authority to the conductor in respect to trespassers? The result is that the refusal of the request to charge in the respect complained of was not erroneous. There was no exception to the charge.

There are other assignments of error, which have not been argued. As they are directed to rulings of the trial judge in matters committed to his discretion, and which are not reviewable on error, they need not be further discussed. For the reasons given, I shall vote to affirm the judgment.

DEPUE, GUMMERE, LIPPINCOTT, ADAMS, HENDRICKSON and NIXON, JJ., dissented.

CURLEY v. HOFF.

Court of Errors and Appeals, New Jersey, March, 1899.

MASTER AND SERVANT — SAFE PLACE TO WORK — FELLOW SERVANTS. — 1. The rule of duty for a master to use reasonable care that the place of working of his servants shall be kept safe is not fully applicable in a case where the work itself involves the place of working. In such a case the duty extends only to the use of reasonable care to discover and give notice of latent danger. The case of *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, explained and distinguished.

2. The rule that a master is not liable for injury resulting to a servant from the negligence of fellow servants in the same common employment, if such servants are selected with reasonable care, is applicable to the construction, under one foreman, of a road with a brick sewer therein. In such a case the bricklayers who build the sewer are in a common employment with the laborers who excavate and sheathe the trench and with the foreman who directs the whole work.

(Syllabus by the Court.)

ERROR to Supreme Court. There was a judgment for plaintiff and defendant brings error.

CHARLES L. CORBIN, for plaintiff in error.

WARREN DIXON, for defendant in error.

COLLINS, J. — This writ of error brings before us exceptions to rulings made at the trial of an action brought by a servant against his master to recover damages for personal injuries sustained in the service, in which action the plaintiff prevailed. The defendant was engaged in constructing, for the county of Hudson, a public road, with a brick sewer therein. At the time the plaintiff was hurt, the different branches of the work were in simultaneous progress under one foreman. As the trench for the sewer was excavated, it was sheathed with planks, held in place by rangers braced laterally across it. As it deepened, these planks were driven down further. Some rock was encountered, and this had to be removed by blasting. The plaintiff was one of two bricklayers engaged in building the sewer, following up the workmen engaged in making the trench. Shortly after a blast of rock, made at a point about 100 feet in advance of the bricklayers, the lower part of the bank on one side of the trench caved in upon and injured the plaintiff as he stooped to his work. At this place the sheathing had not been driven down to the bottom of the trench by some two or three feet, and there was more or less percolation of water, so that the first course of the sewer was being laid in mud. The fall of earth seems to have been due to the action of the water, aided, perhaps, by the jar of the blast. The learned judge who tried the cause refused to nonsuit the plaintiff. He instructed the jury that it is the duty of a master to exercise reasonable care to provide for his servant a safe place in which to work, and to keep it safe, and that he cannot delegate that duty so as to relieve himself of liability. This rule, he said, was subject to the qualification that the servant must assume the risk of obvious or incidental dangers and of his own negligence. In applying the rule to the case in hand, the judge instructed the jury that a delegation of such duty to the foreman would render his negligence imputable to the defendant; and on the assumption that it was the duty of the defendant to afford some protection against the caving

in of the trench, and that he had undertaken to perform that duty by means of sheathing, the judge further instructed the jury that it was the duty of the defendant to exercise "reasonable care in the construction of that sheathing so as to make that place, so far as reasonable care could make it, a safe place for the workman to engage in his labor." Exceptions, duly sealed, present these rulings for review.

The general rule stated to the jury is well established. Recent assertions of it in this court are to be found in the cases of *Comben v. Stone Co.*, 59 N. J. Law, 226, 1 Am. Neg. Rep. 117, 36 Atl. Rep. 473, and *Stone Co. v. Mooney*, 61 N. J. Law, 253, 4 Am. Neg. Rep. 195, 39 Atl. Rep. 764. Its application, however, often presents difficulty. Where the work and place of working are coincident, it seems to have little appropriateness. It is hard to see how, for example, where the work is excavation, the master is under any duty to guard his servants against the very danger that arises from their work. The opinion read for this court in the case of *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. Rep. 380, seems to assert such a duty, but such is not the force of the decision as was pointed out in the Supreme Court in the later case of *Regan v. Palo*, 5 Am. Neg. Rep. 63, 41 Atl. Rep. 364, where it was held that a servant takes the risk of the caving in of the walls of a trench he is digging unless there be a latent danger, which the master, with reasonable care, might have discovered. The facts recited in the report of the *Van Steenburgh Case* show that there was such a latent danger, knowledge of which was chargeable to the master, and therefore this court refused to disturb a verdict against him. The learned judge who delivered the opinion considered the case as one of duty to provide a safe place in which to work, but it is plain that the real duty neglected was the discovery of a latent danger. Had the plaintiff, in that case, been told of the buried water pipe, the presence of which made it unsafe to dig near it, he would have proceeded with the work at his own risk. The case was parallel to one decided at the same term, where the principle was declared that a master is bound "to use reasonable care to protect his servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him." *Telegraph Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. Rep. 384. The declaration in the *Van Steenburgh* opinion that the master was bound by the negligence of the boss foreman was really without pertinence. The record then before the court shows that there was evidence sufficient to warrant the jury in finding that the master himself knew, or ought to have known, of the latent danger. His

contract with the township bound him to protect water pipes, and a public map on file disclosed the existence of the water pipe that constituted the danger. This point was made in the brief filed in support of the judgment. The only exceptions on which error was assigned were to the refusal to nonsuit or direct a verdict for the defendant. Hence nothing was really decided beyond what those exceptions necessarily involved. Coming to a case where sheathing of a sewer trench is necessary or desirable the rule of the master's duty to provide a safe place for working seems as little appropriate. The sheathing is a part of the work, and, where the earth is soft or friable, a necessary part, for without it there can be no trench. There should be no difference between the rule governing the construction of a sewer and that governing the construction of any other work. The trench, sheathed or unsheathed, is a necessary part of such construction.

Another general rule, as well established as that under discussion, is that a master who has used due care in the selection and employment of his servants is not responsible for an injury done to one of them by the carelessness of another in the course of their common employment. The courts of this state have inflexibly adhered to this rule since its first formal assertion in *Harrison v. Railroad Co.*, 31 N. J. Law, 293. It is as applicable to a case where the work involves the place of working as to any other. It has been properly applied by the Supreme Court in *Gilmore v. Nail Co.*, 55 N. J. Law, 39, 25 Atl. Rep. 707, to a case of alleged negligent failure by a foreman to remove from the walls of a mine, in which the plaintiff was drilling holes for blasting, fragments of ore that had been loosened by previous blasts, one of which fragments fell upon and injured the miner; and in *Maher v. McGrath*, 58 N. J. Law, 469, 33 Atl. Rep. 945, to alleged negligent construction, by masons, of a scaffold, for their work, which fell with and injured a laborer delivering upon it brick for the wall being built by the masons. The court itself has unanimously applied it to the alleged negligent construction by ship carpenters of a scaffold necessary for the building of a vessel, where the scaffold fell and injured another carpenter standing upon it at work. *Olsen v. Nixon* (N. J. Err. & App.) 4 Am. Neg. Rep. 515, 40 Atl. Rep. 694. The rule must be equally applicable to negligence in sheathing the sides of a sewer trench, there being, as in this case, no allegation or proof of carelessness in the selection or employment of servants, or that the foreman or workman were in fact incompetent.

The decision in *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. Rep. 619, does not conflict with the views above expressed.

That decision related to mechanical appliances, not a place of working. But the rule of the master's duty is the same in both cases, viz., a reasonable care for the servant's safety. While delegation to others will not relieve the master from the consequences of negligence in the performance of what the law makes the master's duty, it will not charge upon the master the consequences of the negligence of his servants towards each other. The risk of that negligence, for reasons of public policy, the law places on the servants. The test always must be whether the negligent act or omission was in discharge of the master's or the servant's duty. *Smith v. Iron Co.*, 42 N. J. Law, 467. In the *Ingebregsten* Case it was acknowledged that inspection incidental to use of a tool or appliance was the servant's, not the master's, duty. So in the case in hand the keeping safe a place of working incidental to the work itself was the servant's, not the master's, duty. This distinction is well illustrated by a decision of the New York Court of Appeals. A laborer was employed in breaking out and loading lumps of clay. The clay bank overhung him, but was safe as long as it was undisturbed. In the progress of the work the foreman weakened the cohesion of the bank above the laborer, and it fell upon and injured him. It was held that the master was not liable. *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371. In a leading case in England it was decided that, while the owners of a mine were bound to use reasonable care to provide a proper system of ventilation, so as to prevent accumulation of fire damp, they were not responsible for the negligence of their underground manager in obstructing the free working of the system by a scaffold set up to reach a coal seam. *Wilson v. Merry*, L. R. 1 H. L. Sc. 326. In this case Lord Chelmsford's opinion is very convincing, both as to the distinction drawn and as to the manager's being a fellow servant with the miners (1). A well-considered opinion of the same purport is that of Gray, Ch. J., in *Holden*

1. In *Wilson v. Merry*, L. R. 1 H. L. Sc. 326 (House of Lords, Scotch Appeals, May, 1868), an action for damages for the death of plaintiff's son who was killed while engaged as a miner in defendant's employment, the doctrine of fellow servant and the master's immunity, and the duties of the master in respect to furnishing proper materials for the servant's work, are fully discussed.

As to fellow-servant: the Lord Chancellor (Lord Cairns), said: "I do not think the liability or nonliability, of

the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman, or *collaborateur*, of the sufferer." Lord Cranworth said: "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority." Lord Chelmsford said: "It has certainly been held by Scotch judges of great eminence that the exoneration of a master from liability for injury arising to one fellow-servant from the negligence of another

v. Railroad Co., 129 Mass. 268. Of course, a master must use reasonable care to furnish sufficient and suitable materials for what is essential to a given piece of work; but, when he performs that duty, a failure to use them, or negligence in their use, is not chargeable to him. *McLaughlin v. Iron Works*, 60 N. J. Law, 557, 38 Atl. Rep. 677. In the later case of *Day v. Donohue* (N. J. Err. & App.) 41 Atl. Rep. 934, where a bricklayer was injured through the falling of

does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the others. * * * But subsequent cases in England have clearly established that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes." Lord Colonsay, in referring to the terms "fellow workman" and "*col-laborateur*," said: "They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great system of organization that now exists. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman" or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge."

As to the duties of the master: Lord Chancellor Cairns said: "The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants for

the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen." Lord Colonsay said: "Culpable negligence in supervision, if the master takes the supervision on himself, — or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, — or the failure to provide or supply the means of providing proper machinery or materials — may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment wherein, if the master fails, he may be responsible."

a scaffold, submission to the jury of the servant's claim against the master was justified because the putlog that broke was defective, and unfit for the use for which he had furnished it. In the case now before us the proximate cause of the injury was the neglect to drive down the sheathing planks to the bottom of the trench, or, perhaps, the placing of the planks too far apart. There was no lack or inadequacy of materials for sheathing and bracing. The fault, if any, was entirely with the servants engaged in the work, and not with the master. The foreman in this regard was a fellow servant with the plaintiff. *O'Brien v. Dredging Co.*, 53 N. J. Law, 291, 21 Atl. Rep. 324; *Gilmore v. Nail Co.*, *ubi supra*; *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. Rep. 1057; *McLaughlin v. Iron Works*, 60 N. J. Law, 557, 38 Atl. Rep. 677; *Olsen v. Nixon*, *ubi supra*; *Loughlin v. State*, *ubi supra*; *Wilson v. Merry*, *ubi supra*.

The only question possible to raise in this case is as to whether the plaintiff, in laying the sewer, was in a common employment with the workmen who did the sheathing. I can conceive of cases where a servant following up work of other servants of the same master may be injured through the result of their negligence, and yet have a remedy against the master for neglect of duty to use reasonable care to provide a safe place for working. No general rule can be formulated that will fit every case. A jury question may, perhaps, arise on that subject. In this case the trial judge treated the question as a legal one, and, I think, decided it wrongly. A bricklayer building a sewer as the excavation and sheathing of the trench proceeds is unquestionably engaged in a common employment with the workmen constructing the trench. The contract for road and sewer was an entirety, and all the men worked together for the common design. In *Olsen v. Nixon*, *ubi supra*, the servant injured was employed after the scaffold that broke was constructed, yet he was held to have been in the common employment and without remedy.

There was, therefore, error in putting the case to the jury as one in which it was possible to find a breach of the master's duty, or one in which the foreman's negligence was imputable to the master. But, even if this were not so, the plaintiff should nevertheless have been barred of recovery, for the reason that the undisputed facts brought him within the conceded qualification of the rule invoked, viz., that the servant assumes all obvious risks. The plaintiff knew better than anyone that the sheathing at the place where he was working had not been driven down; and if, as was claimed by some witnesses, the planks were not close to one another, he also knew that fact. His work was at the very bottom of the trench, and he was experienced in the work. One of his witnesses was the county's.

inspector, and he testified that the bracing, as he called it, was done upon consultation with the plaintiff. The plaintiff knew of the percolation of water, for he laid his bricks in the mud. He knew, of course, that blasting was in progress, for it was frequent; and the custom was to give warning to leave the trench when the blast was fired, in order to avoid danger from the flying rock. At the blast just before the accident the usual warning was given, and although defendant's witnesses said that the plaintiff disregarded the warning, and remained at work, he himself testified that he left the trench, and returned after the explosion, and was just resuming his work, when the bank fell or slid upon him. He further testified that, according to his custom, he looked at the bank as he passed down into the trench after the explosion, and that it looked all right. He therefore deliberately assumed the risk of remaining at work.

There must be a reversal, and a *venire de novo*.

EXTON v. CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Supreme Court, New Jersey, February, 1899.

CARRIER AND PASSENGER — ACTS OF STRANGERS — PASSENGER AT STATION WHILE LOOKING AFTER BAGGAGE INJURED BY CABMEN SCUFFLING IN PASSAGEWAY. — 1. When a person purchases a ticket at the station or depot of a railroad company, intending to be a passenger on the cars of the company, the relation of common carrier and passenger is established, and the company is required to exercise reasonable care to protect the passenger from injury in the use of the station or depot for the purposes of the journey; and if the passenger uses the usual ways and passages for the purpose of obtaining checks for baggage, and is injured by any dangers, existing in or on such ways and passages, which are known, or ought to be known, to the servants of the railroad company having charge of such station or depot, or which could have been reasonably anticipated by them, and reasonable care has not been exercised to protect the passenger from such dangers, liability exists on the part of the defendant company to respond in damages for such injuries.

2. The company is liable for injuries so caused, even if the dangers arose from the acts and conduct of intruders or strangers, if such acts and conduct were so continued and so notorious that the servants of the defendant company in charge of the depot, and the passageways thereof, devoted to the use of passengers, knew of such acts and conduct, or should have known of them and of the dangers arising therefrom.
3. The questions whether dangers exist, and whether they were habitual and notorious, and whether the company had knowledge of them, or should have had such knowledge, where the evidence is in dispute, are questions which must be submitted to the jury for their determination.

4. A passenger has the right to assume that the usual passage leading from the ticket office of a railroad station to the baggage room is safe for use, for the purpose of obtaining baggage to be checked, and the use of it cannot be contributory negligence, merely because there was another way which might have been used without injury, when the dangers of the used passageway were not perceivable or avoidable by the passenger in the exercise of ordinary care in the use of the depot and passageway for the purposes of the journey to be undertaken; and the question whether such care has been exercised, where two opposite inferences can be reasonably drawn from the evidence in this respect, is for the jury to determine.
5. Where a passenger, in attempting to have her baggage checked, was knocked down and injured on a passageway leading from the ticket office or waiting room, in a railroad depot, to the baggage room therein, by cabmen on the same, awaiting incoming trains for the purpose of soliciting passengers in their cabs, and which cabmen were not in any sense the servants of the railroad company, the injury being caused by the cabmen being engaged, in sport, in scuffling on the passageway, and coming violently in contact with the passenger and injuring her, and the passageway being under the control of and part of the depot of the railroad company, *held*, that evidence of similar occurrences, to the annoyance and injury of passengers, previous to the time of the accident in question, was admissible to show the dangers to passengers existing there, and also as tending to show that the servants of the railroad company in charge of the depot had, or ought to have had, knowledge of such dangers. *Held*, also, that the railroad company was bound to exercise reasonable care to protect its passengers from injury from such dangers, and that a neglect of the servants of the railroad company to exercise such care, resulting in injury to its passengers, established liability to respond in damages.

(Syllabus by the Court.)

RULE to show cause why verdict in favor of plaintiff should not be set aside.

PAUL A. QUEEN and H. B. HERR, for plaintiffs.

GEORGE H. LARGE and JOHN L. CONOVER, for defendant.

LIPPINCOTT, J. — This is an action by Joseph H. Exton and Fanny P. Exton, his wife, against the Central Railroad Company of New Jersey, to recover damages for personal injuries to Mrs. Exton and resulting damages to her husband. The declaration contains two counts, — one averring damages to the wife for her personal injuries, and the other for resulting damages to her husband. The jury returned a verdict in favor of the plaintiffs, and awarded the sum of \$500 damages to Mr. Exton, and the sum of \$1,750 to Mrs. Exton.

It was not contended upon the argument that the damages were excessive. An examination of the evidence as to this question does not reveal any misapplication of the law by the jury in its award of damages. The facts of the case fully warrant the verdict as to the amounts awarded.

The only discussion is whether, upon the evidence in the cause,

upon the application of proper principles of law, the jury could determine, as they did, that liability of the defendant to respond to damages existed. The undisputed facts are that on November 23, 1893, Mrs. Exton was on her way from Brooklyn, where she had been making a visit, to her home at Highbridge, in this State. She proceeded to the Central Railroad depot or passenger station on West street, at the foot of Liberty street, in the city of New York. She entered the waiting room in which the ticket office is located, and purchased her ticket. The main waiting room and entrance to the ferry across Hudson river to the train in Jersey City lie further inside. Her trunk was in the baggage room, and, after she had purchased her ticket, she went out of one of the doors of this waiting room, upon the passageway to the baggage room or the window thereof, in order to have her baggage checked. As she proceeded along this passageway, and when near the window of the baggage room, she saw two men scuffling on or near the passageway. Instantaneously, she was run against or backed against by one of these men, and knocked down and injured. She says at the moment she saw them she was knocked down and injured, and in this assertion she is not contradicted. They were just inside an offset of the building, at the window or entrance to the baggage room, and she was knocked down just as she turned the corner of this offset, and it was only at that moment that she saw the men. It appears from the evidence that the passageway is a board walk or plank or platform about four feet wide. Outside of this is also a stone walk three feet wide. This walk ran along in front of the passenger station leading from the waiting room or ticket office to the baggage room, a little to the south of the waiting room. The baggage room sets a little back from the outside line of the passenger station or waiting room, and there a recess angle or offset is created. It was just at this recess, near the window, that the scuffling of the men and the knocking down of Mrs. Exton took place. Over these spaces in front, and extending further out, is a roof, supported, nearer the outward edge thereof, by iron columns or supports. There is no dispute in this case that this board walkway is usually used by passengers to get their baggage checked after the purchase of their tickets, or before they go to the inside or main waiting room, on their way to the ferryboats, to cross the river. The evidence also shows that the maintenance and care of this walk belongs to the defendant company as a part of its depot or station. The evidence also is undisputed that she was knocked down by reason of the scuffling of two hackmen on this walk. One of them stepped or jumped backwards, while engaged in the scuffle, and knocked her

down. This was at or very near the angle of the walk, at the baggage room window or entrance. The cabmen engaged in this scuffle were in no sense the servants or employees of the defendant. They were engaged in waiting for passengers and baggage from incoming trains, for transportation to their destination in New York City or elsewhere.

Evidence was admitted by the trial justice, over objection by the defendant, that numerous cabmen and hackmen, including the two engaged in this scuffle, with the knowledge and permission of the officers and employees of the defendant, for a long time previously to the accident, perhaps ever since the erection of the ferry entrance or depot, had been in the habit of taking their stand near the entrance to the depot, upon these walks, and under the space roofed, for the purposes of their trade, in soliciting the carriage of passengers and baggage in their cabs and hacks. This evidence is undisputed. Evidence was also admitted, over objection, and on the defense denied, that very frequently, and covering considerable space of time, previous to the occurrence of this accident, these cabmen and hackmen, including the two engaged in the scuffle, on this walkway, and in its immediate vicinity, had indulged in scuffling of a kindred character to that which caused the injury to Mrs. Exton. Many passengers had observed it on their way to the ferry entrance and to the baggage room, and some passengers had been annoyed and incommoded, if not injured, thereby. There is evidence in the case tending to show that the general passenger agent of the defendant had been notified by one or more of the passengers of this state of affairs, and that other of the employees of the defendant had actual knowledge of these occurrences.

This evidence was properly admitted to the jury — First, as tending to show the dangers connected with the use of this way to the baggage room, of which Mrs. Exton could have no previous notice or knowledge, and of the character of the danger, it being such as that its existence could not be previously observed by any passenger in the use of the walk; and, secondly, as tending to show that the servants of the defendant in charge of the station had knowledge of these occurrences and dangers on that walkway, or should have had knowledge of them in the exercise of reasonable care to guard its passengers against accidents and injury from situations of danger likely to arise while under its care. The evidence was admissible for the jury to reach a conclusion whether this scuffling, in short, was a danger, to which passengers were subjected, of such frequent and notorious occurrence that a reasonable inference could be drawn that the defendant, through its employees in charge of the

depot, did have, or should have had, knowledge of the dangers there existing, or should reasonably have anticipated them, and whether they were such that the defendant should guard against, and whether, in failing to do so, it was guilty of such negligence as rendered it liable to passengers injured thereby. That this class of evidence is admissible cannot now be controverted. Evidence to show existing dangers, their continuance, their notoriety, and whether observable to the plaintiff or defendant, is admissible, in the aspects which a case of this character presents, both in reason and upon authority. Adjudicated cases are numerous supporting the admissibility of this class of evidence. While exceptions were taken and allowed to the admission of this evidence, its competency on the argument of this rule seemed to be conceded.

At the close of the evidence for the plaintiffs a motion to nonsuit was made, on the grounds that the negligence of the defendant had not been established, and that Mrs. Exton, by the evidence, was guilty of contributory negligence. This motion was denied, and, after evidence for the defense, the cause was submitted to the jury. It is clear that, upon well-settled principles, the trial justice was right in denying this motion. Both questions were for the jury. *Railroad Co. v. Shelton*, 55 N. J. Law, 342-345, 26 Atl. Rep. 937; *Goldsboro v. Railroad Co.*, 60 N. J. Law, 49, 2 Am. Neg. Rep. 408, 37 Atl. Rep. 433; *New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.*, 60 N. J. Law, 52, 3 Am. Neg. Rep. 58, 37 Atl. Rep. 627. The principle has been laid down so often as to make repetition needless. *Traction Co. v. Scott*, 58 N. J. Law, 683, 34 Atl. Rep. 1094. In this case it was conceded that the plank walk in question was a part of the railroad station, and provided for the use of the passengers of the company. It was constructed for this purpose, and was under the exclusive control of the railroad company. No contention otherwise is made by the defendant. Every person who came upon it for the purpose of entry to the ferryhouse, or to check his baggage before entering the waiting room to the ferryboats of the defendant to continue his journey, became a passenger, and entitled, as such, to be protected from any danger of injury, so far as the defendant company could render protection by the exercise of that care required of it in the relation of common carrier and passenger. The plaintiff there, on the board walk, was as much a passenger as if she had been seated in the ferryboat or cars of the defendant company. It may be that the degree of the care required differed, depending upon the circumstances in which the plaintiff was placed, or it may be that there was required of her a greater care of herself, in order to free her from the charge of contributory

negligence, but that the relation of common carrier and passenger did exist cannot be disputed. *Patt. Ry. Acc. Law*, 214; *Buffett v. Railroad Co.*, 40 N. Y., 168; *Donovan v. Railway Co.*, 65 Conn. 201, 32 Atl. Rep. 350; *Gordon v. Railroad Co.*, 40 Barb. 546; *Hansley v. Railroad Co.*, 115 N. C. 602, 20 S. E. Rep. 528; *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72; *Railroad Co. v. Galliher*, 89 Va. 639, 16 S. E. Rep. 935 (1); *Allender v. Railroad Co.*, 37 Iowa, 264 (2); *Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. Rep. 178 (3); *Railroad Co. v. Price*, 96 Pa. St. 256; *McKernan v. Railway Co.*, 54 N. Y. Super. Ct. 354; *Ray, Neg. Imp. Dut.* pp. 9, 10, and cases cited.

The walkway, therefore, being provided by the defendant company for the use of the traveling public for the purposes of travel on its ferryboats and railroad trains, the defendant company were bound to use reasonable care to keep it safe for the use of their passengers. It was one of the means which the plaintiff had the right to use for the purpose of getting her baggage checked, and obtaining her checks therefor preparatory to going across the ferry, or for any other lawful purpose connected with her journey, and she had the right to assume it was reasonably safe for her to use for any such purpose, and the company was bound to exercise reasonable care to render it suitably safe for her. *Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 5 Am. Neg. Rep. 21, 19 Atl. Rep. 178. The defendant company had the right to eject anyone creating disorders or disturbance there, or annoying the passengers, or engaging in such conduct as might injure them, and to take such measures in these respects as would render it safe. *Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. Rep. 667; *Ray, Neg. Imp. Dut.* secs. 32-46, and cases cited.

It was proper to submit to the jury the question of the dangers of this way, and whether they were habitual, customary dangers, which the defendant could reasonably anticipate might exist, and whether they were such as required precautions against accident and injury to passengers therefrom, and whether the defendant had exercised the required degree of care and caution to protect its passengers from such dangers. If the defendant had notice or knowledge of what might happen in its depot, or could reasonably anticipate what might happen there, dangerous to others lawfully there, it was bound

1. See note of this case in NOTES OF VIRGINIA CASES UPON ASSAULTS AND EJECTION OF PASSENGERS, 8 Am. Neg. Cas. 651. Am. Neg. Cas. 323. See also subsequent decision in same case (43 Iowa, 276), reported in 3 Am. Neg. Cas. 342.

2. *Allender v. Chicago, R. I. & P. R'y Co.*, 37 Iowa, 269, is reported in 3 in 5 Am. Neg. Cas. 21.

3. *Delaware, L. & W. R. R. Co. v. Trautwein*, 52 N. J. L. 169, is reported in 5 Am. Neg. Cas. 21.

to use care to avoid the injury which might be occasioned, and it would matter little whether the danger was habitually existing or might occur only at intervals. Nor can it matter but little whether the dangers arose from the acts of the servants and employees or others, so long as the dangers existing are not observable by the passenger, so as to be avoided, and they were known to, or ought to have been known to, the defendant, or anticipated by the officers of the defendant company in charge of the station. A railroad company is a common carrier, and owes to its passengers the duty of guarding them from assaults and insults from their fellow passengers and strangers, when, from a high degree of care, the same might have been prevented. *Putnam v. Railroad Co.*, 55 N. Y. 108 (1); *Holly v. Railroad Co.*, 7 Reporter, 460 (2); *Hendricks v. Railroad Co.*, 44 N. Y. Super Ct. 8. This duty grows out of, and is impliedly a part of, the contract between the carrier and the passenger. According to the uniform tendency of adjudications which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and insults and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and, while not required to furnish watchmen or servants sufficient to overcome all force or negligence, when unexpectedly happening, yet it is the duty to provide reasonable precautions to protect the passenger from assaults from any quarter at which they might reasonably be expected to occur, under the circumstances of the case and the condition of the parties. *Railroad Co. v. Burke*, 53 Miss. 200 (3); *Railway Co. v. Hinds*, 53 Pa. St. 512 (4); *Flint v. Transportation Co.*, 34 Conn. 554 (5). Carriers of passengers are bound to exercise the utmost care in maintaining order and guarding those they transport against violence, from whatever source arising, which might be reasonably anticipated or naturally expected to occur. *Flint v. Transportation Co.*, 34 Conn. 554, *supra*. The carrier must exercise the care required to protect the passenger from violence

1. See note of this case in NOTES OF NEW YORK CASES UPON ASSAULTS AND EJECTION OF PASSENGERS, 8 Am. Neg. Cas. 553.

2. See *Holly v. Atlanta Street R. R. Co.* 61 Ga. 215, an abstract of which case appears in 8 Am. Neg. Cas. 117.

3. See abstract of this case in 8 Am. Neg. Cas. 452-453.

4. *Pittsburg, F. W. & C. R'y Co. v. Hinds*, 53 Pa. St. 512, is reported in 8 Am. Neg. Cas. 602.

5. *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554, is reported in 8 Am. Neg. Cas. 103.

even by a stranger. *Sherley v. Billings*, 8 Bush. 147 (1); *Farber v. Railway Co.*, 116 Mo. 81, 22 S. W. Rep. 631 (2); *Eads v. Railway Co.*, 43 Mo. App. 536 (3). The carrier is bound to protect from the insults and wanton interference of strangers and fellow passengers. *Winnegar's Adm'r v. Railway Co.*, 85 Ky. 547, 4 S. W. Rep. 237 (4); *Railroad Co. v. Finney*, 10 Wis. 388 (5). The general rule is clear that, from whatever source the danger may arise, if it be known, or should have been known, care must be exercised to protect the passenger from that danger.

A nonsuit could not have been justified. The evidence on the part of the defendant was confined principally to a denial that the occurrences of scuffling between the cabmen at the ferry entrance and on this walkway to the baggage room, previous to the time of this accident, as detailed in the evidence on the part of the plaintiffs, had ever occurred. This raised a clear question of disputed fact for the jury to determine.

Evidence was also produced on the part of the defendant that the officers of the defendant company and the employees in charge of the ferry had never known of the previous happening of these occurrences on this walkway. This evidence also raised a question of fact for the jury, along with the other question of fact, whether, from the whole evidence in the case, such occurrences had ever happened, and, if so, whether they were of the character to affect the defendant with notice or knowledge of them, and whether they presented a danger which it became the duty of the defendant to guard its passengers against. The trial court would not have been justified in withdrawing these questions from the jury, and therefore the trial justice was correct in refusing to direct a verdict for the defendant. The evidence in the case justified the verdict of the jury, and therefore the rule to show cause is discharged, with costs.

1. See NOTE OF KENTUCKY CASES MISSOURI CASES UPON ASSAULTS, ETC., UPON ASSAULTS, ETC., in 8 Am. Neg. in 8 Am. Neg. Cas. 486-487. Cas. 294.

2. *Farber v. Mo. Pac. R. Co.*, 116 Mo. 81, is reported in 8 Am. Neg. Cas. 475.

4. See NOTE OF KENTUCKY CASES UPON ASSAULTS, ETC., in 8 Am. Neg. Cas. 294.

3. See this case in the NOTES OF WISCONSIN CASES UPON ASSAULTS, ETC., in 8 Am. Neg. Cas. 678-679.

5. See abstract of this case in NOTES OF WISCONSIN CASES UPON ASSAULTS, ETC., in 8 Am. Neg. Cas. 678-679.

**AYRES v. DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY.**

Court of Appeals, New York, March, 1899.

CARRIER AND PASSENGER — PASSENGER FALLING OVER MAIL BAG ON PLATFORM. — The platform of a railroad station is presumed to be a place of safety and a passenger is not bound, as a matter of law, to look down for obstructions while walking thereon.

DAMAGES. — Where more than three years had elapsed since the plaintiff's knee was injured, and she still limped and could not swing the injured leg back as far as the other without pain, the jury were warranted in finding that her knee was not entirely well and that she would suffer some inconvenience from it in the future.

EVIDENCE — PHYSICIAN. — Evidence of a physician as to the length of time plaintiff's physical condition would continue "with reasonable certainty" was proper where it was shown that he had treated the plaintiff for several months.

APPEAL from judgment, Supreme Court, Appellate Division, Fourth Department (4 App. Div. 511; 40 N. Y. Supp. 11), affirming a judgment in favor of plaintiff.

WILLIAM KERNAN, for appellant.

WILLIAM TOWNSEND, for respondent.

VANN, J. — On the 23d of October, 1891, the plaintiff, a physician residing at Saratoga, was called professionally to Brookfield, in the county of Madison. The next day, on her way home, she went to North Brookfield for the purpose of taking a train on the defendant's railroad. She entered the depot by the rear door, bought her ticket, and after waiting nearly an hour for the train, which was late, went out on the platform, through the front door, in order to enter a car. By this time it was dark, and the lamps by which the platform was usually lighted were not burning, but a little light came through the windows of the depot and the passenger coach. The plaintiff was not familiar with the locality, having never been there until this occasion, except as she had passed through a day or two before. As she went from the depot out upon the platform the train was still moving north, and she walked south, with the other passengers, to take the passenger coach. The platform was in good order and without obstructions, but, before the train stopped, the postal clerk in charge of the mail car threw a mail bag out, as he had long been in the habit of doing, and it fell across the route of the plaintiff. As she walked along at her usual gait, looking straight

ahead, with several people in front of her going in the same direction, she did not see the bag, but stumbled over it in the dark, fell, and was injured. She had looked up, as she passed along, at the windows of the first car she met, and seeing that it was a smoking car, went on; and she had walked between thirty and forty feet on the platform when she met with the accident. The action has been tried three times, and the last trial, which is now before us for review, was held in May, 1895, about three and one-half years after she was injured.

As it appears from the record that the affirmance by the appellate division was unanimous, we are compelled by the Constitution and the statute to presume that there was sufficient evidence to sustain the facts found by the jury. Const. art. 6, sec. 9; Code Civ. Proc. sec. 191. The exceptions taken to the rulings relating to evidence and to the charge are, however, open to review, and we will briefly consider the most important of those that have been called to our attention.

At the close of the charge the defendant asked the trial judge to instruct the jury "that, while the plaintiff may not have been bound to keep her eyes down all the time that she was going as far as the mail bag, she was bound to use reasonable care, and at least look upon the platform at some time during the journey." The court refused to charge in those words, but charged "that the plaintiff was bound to use reasonable care in going from the station room to the car, and that, if she did not, she cannot recover." The defendant excepted to the modification and to the refusal. In the body of his charge the learned trial judge had said to the jury that, "no matter how negligent the defendant may have been, if the plaintiff was also negligent in such manner that her negligence contributed to the injury, she cannot recover;" that the "plaintiff was called upon, in going upon that platform, to use such care and prudence as a person of reasonable care and prudence would use under like circumstances. Now, what should she do? Perhaps you will have no difficulty in concluding that in going to that car she was not compelled to look at her feet all the time, but she was entitled to go to her car precisely as any other person of ordinary care and prudence would go. If there is something which she did which she ought not to have done; if there is anything which, from the evidence, you think justifies the conclusion that she was going along carelessly, or that she ought to have looked at this time, ought to have seen that this mail bag was there, — then, of course, she is guilty of contributory negligence. Contributory negligence is a question of fact for the jury, and I leave that question to you.

If you should find that she was guilty of contributory negligence, notwithstanding you should find that the defendant was guilty of negligence, she cannot recover." The plaintiff had testified on her cross-examination that she did not bend her head down, but looked just as all do when they are walking; that she was walking as she always did, and was not looking down on the platform, but looking straight ahead, in the direction of the car that she was seeking, in order to get upon it. The plaintiff had purchased a ticket, and was in the act of taking passage on the defendant's train. She was therefore a passenger, and it was the duty of the defendant to provide a safe platform for her to walk upon in order to enter a coach, and not to expose her to any unnecessary danger, or to one of which it was aware. *Carpenter v. Railroad Co.*, 97 N. Y. 494. She had the right to presume that the platform was a safe place, because it was provided by the defendant for passengers to walk upon as they were invited to enter its cars. Hence instructions that would be proper for a place of known danger, such as a railroad crossing at grade, would not be appropriate to a place which the passenger had a right to presume was safe. While a railroad company may insist upon the specific instruction to the jury that a traveler crossing its railroad at grade is bound to look and listen, and, if necessary, stop until the train has passed, this is because of the well-known danger of walking or driving in front of a moving train, which cannot stop, and which has the right to proceed without stopping. The platform of a railroad station, however, is not a place of known danger, but is presumed to be a place of safety. In this respect it is not unlike an ordinary sidewalk in a public street, which the wayfarer has the right to assume is in a safe condition until in some manner warned of danger. *Moebus v. Herrmann*, 108 N. Y. 349, 354, 15 N. E. Rep. 415; *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. Rep. 424; *McGuire v. Spence*, 91 N. Y. 303; *Weed v. Village of Ballston Spa*, 76 N. Y. 329, 333. In *McGuire v. Spence* the court said: "He who approaches a railroad crossing approaches a place of danger, and he must look and listen, for he is bound to anticipate a possible harm. But one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard." While the plaintiff was bound to exercise care, she was not bound to exercise any more care than the law requires in a place presumed to be safe. Hence we cannot say, as matter of law, that she was bound to look down on the platform while walking a given distance thereon, although the jury could so find as a matter of fact. After charging that she was bound to use reasonable care, and that, if she did or omitted anything that a

person of reasonable care and prudence would not have done or omitted under like circumstances, the trial judge was not bound to say, in the language of counsel, that she was obliged "to look upon the platform at some time during the journey." If she was bound to look once in a short distance, how many times may we be called upon to say, as matter of law, that a person would be bound to look in a long distance? Where are we to stop? Moreover, the plaintiff testified that she looked straight ahead, just as all people do when they are walking, but did not look down on the platform. This does not necessarily imply that she did not see the platform at all. The jury had the right to find that she had the view in front of her under command, and that as she advanced her vision continually covered the platform a little way in front of her, and, hence, gradually the whole as she walked along. When a person looks straight ahead it is a warrantable inference that he sees the walk before him, and, while he does not see the part directly at his feet just as he is about to pass over it, it does not follow that he did not see it when a little more remote from it. In *Boyce v. Railway Co.*, 118 N. Y. 314, 319 (1), 23 N. E. Rep. 304, it was held that a passenger alighting from a coach on an elevated railroad "was under no obligation, as a matter of law, to look before she put her foot down, but it was a question of fact for the jury to decide, not only whether she should have been more vigilant, but also whether, if she had looked, she could have seen the hole in the surrounding darkness." I think the exception under consideration was not well taken.

The defendant asked the court to charge "that upon the evidence there is no ground upon which the jury can find any future damages in reference to the injury to the knee." The trial judge said: "I will not charge that as a matter of law. They will take all the evidence. She, I think, stated that the knee was still troublesome. At least, the jury will remember the evidence, if any, upon that subject. If the evidence satisfies the jury that there is no longer any difficulty with the leg, then, of course, she cannot recover anything in reference to future damages. I do not remember definitely, and would not want to charge as matter of law, about it." The defendant excepted, and thereupon asked the court to charge the jury "that they had no right to guess or speculate in reference to any future damages, but they must be reasonably certain upon the evidence in their own minds," and the court charged accordingly. There was no request to charge that the jury could not find any permanent damages with reference to the knee, but simply that they

1. *Boyce v. Manhattan R'y Co.*, 118 N. Y. 314, is reported in 5 Am. Neg. Cas. 304.

could not find any future damages. The evidence tended to show that the plaintiff fell heavily upon her knee, causing an abrasion and inflammation. It swelled until on the tenth day after the accident it was twice its natural size, and the knee cap floated, owing to the effusion of water around the joint. There was more or less pain for a long period. The leg was put in a plaster cast, which she wore seven or eight weeks, remaining in bed all the time. After removing the plaster cast, the leg was stiff, and a brace was worn for three or four months, so constructed as to keep the joint apart and avoid friction in walking. After that a different kind of brace, made of leather and iron, and reaching from the hip to the bottom of the foot, was worn for awhile. This was followed by a third, consisting of an iron band covered with leather around the waist, with two perineal straps passing between the limbs, and a long iron brace from the side to the foot. This enabled her to walk without any weight on the knee joint. At the time of the last trial the knee was very much improved, although not entirely well. She testified that her knee improved with the extension brace, "and does improve. I wear an elastic brace all the time now. I cannot bend it (meaning the knee) as I can the other. * * * I do not experience any pain from the knee now, — not unless I attempt to bend it back as far as I can the other, and I find I cannot do that. What little I do walk, the pain does not seem to be in the knee joint. I do not think I have had any noticeable pain for the last six months. Every one tells me I limp. I may have got used to it. I wear about it, to support it, a silk brace. It looks very much like a silk stocking, only made of heavy rubber and silk. It comes from the calf of the limb half way to the hip joint. I have always worn one since I left off the other brace; never have gone without it. I left off the long brace, and put this on, two years in June, and I have worn this brace since." Her physician testified that: "The knee is as nearly normal as a physician can get it; I mean natural. Q. Is it so that it is actually normal, or is it not quite perfect? A. That is impossible for me to say, because I can only state what I saw. So far as my observation goes, the knee is normal, and should be at this time." One witness, a lady who had frequently seen the plaintiff up to within a short time of the trial, stated that "she always limped." Another stated that she had seen the plaintiff limp when walking, and that in going up the steps to get to the house she would put up one foot, then place the other on the same step, and come up sideways; that when she came down she would take hold of the railing, and come down sideways. The plaintiff's mother, who had her under almost constant observation, testified that

she walked better and stronger, "but that limb don't swing like the other one. She has had a long rubber stocking for support. * * * She has not used a cane for six months, that I know of. * * * She has walked a great deal better and stronger since 1893." This evidence warranted the jury in finding that the plaintiff's knee was not entirely well, and that she would certainly suffer some inconvenience from it in the future, because, although more than three years had elapsed since the accident, she still limped, and could not swing her injured leg naturally, or as far back as the other, without pain.

Any physical disability or derangement, directly caused by the accident is a proper element of damage. As there can be but one recovery, it may include damages, not only for what has been actually suffered, from the disabling effect of the injury down to the time of the trial, but also for such pain or inconvenience as is reasonably certain in the future. The prospective disablement may be inferred from the nature of the injury, or proved by the opinions of experts. *Curtis v. Railroad Co.*, 18 N. Y. 534; *Filer v. Railroad Co.*, 49 N. Y. 42 (1); *Kane v. Railroad Co.*, 132 N. Y. 160, 30 N. E. Rep. 256; *Shear. & R. Neg. sec. 597*; *Suth. Dam. sec. 86*; *Field, Dam. sec. 668*; *Hale, Dam. 78*. In the *Curtis Case* the court said: "In estimating the pecuniary loss in such cases, all the consequences of the injury — future as well as past — are to be taken into consideration." And in the *Filer Case*: "Successive actions cannot be brought by the plaintiff for the recovery of damages, as they may accrue from time to time, resulting from the injury complained of, as would be the case for a continuous wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act; and the plaintiff was entitled to recover, not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages, — that is, compensation for all the damages resulting from the injury, whether present or prospective. The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury." In *Kane v. Railroad Co.*, 132 N. Y. 160, 30 N. E. Rep. 256, the plaintiff had sustained an injury to his hip in a railroad accident; and evidence was given tending to show that, while he was sound before the accident, at the time of the trial his hip troubled him in damp weather, and he could not walk as well as he used to. The court charged that he was entitled "to recover

1. *Filer v. N. Y. Central R. R. Co.*, the same case in 5 *Am. Neg. Cas.* 151, 49 N. Y. 42, is reported in 5 *Am. Neg.* 161, 162.
Cas. 147. See subsequent decisions in

for the injuries that he has sustained, and that the jury can look to the future as well as to the past, because the plaintiff can maintain no other action." The charge was sustained as correct, and it was held that he was entitled to recover for the pain that he would endure in the future. In *Strohm v. Railroad Co.*, 96 N. Y. 305, relied upon by the appellant, while it was held that an expert could not state that certain symptoms might develop into something worse, because it was too speculative, still the court said that "future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded. But, to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." In the case before us it did not need the testimony of experts to show that the plaintiff would suffer more or less inconvenience in the future owing to the condition of her knee, as it was not yet well, and some time would be required to effect a complete recovery. While the future inconvenience might be slight, and of short duration, the defendant was not entitled to have it altogether withdrawn from the consideration of the jury, or to the instruction that "there is no ground upon which the jury can find any future damages in reference to the injury to the knee."

The condition of the plaintiff's spine as a result of the accident, was the subject of sharp controversy upon the trial. A physician who had treated her for several months, after describing the condition of her spine from actual observation, was asked: "In your opinion as a physician, are you able with reasonable certainty to form an opinion as to the length of time that the condition of the spine, which you have described here upon the stand as existing in the plaintiff, will continue?" After answering in the affirmative, he was next asked: "What will be the continuance of the condition of the spine, in the ordinary and natural course of nature?" The witness answered: "That this condition will continue. That without treatment it will probably increase, and will trouble her more or less as long as she lives. Under the most favorable

circumstances, after awhile it might decrease to a certain extent, and remain there. With perfect rest, mentally, and physically, and proper treatment, that after a time it would cease to be troublesome at all, possibly." Each of these questions was separately objected to as incompetent, but the court overruled the objection, and the defendant excepted. The answer to the second question was not objected to as not responsive, and no motion was made to strike it out on that ground. The answer to the first question qualified the witness to state with "reasonable certainty" his opinion, called for by the second, as to the continuance of the condition of the spine "in the ordinary and natural course of nature." This was substantially the language used in the Strohm Case, and the questions objected to were competent under that and the later cases. *Turner v. City of Newburgh*, 109 N. Y. 301, 309, 16 N. E. Rep. 344; *Griswold v. Railroad Co.*, 115 N. Y. 61, 63, 21 N. E. Rep. 726.

After considering all the other exceptions properly before us, we find none calling for a reversal of the judgment, which should therefore be affirmed. All concur, except Gray and Haight, JJ., dissenting.

Judgment affirmed.

STALEY V. MAYOR, ETC., OF THE CITY OF NEW YORK.

*Supreme Court, New York, Appellate Division, First Department,
February, 1899.*

MUNICIPAL CORPORATIONS — DUTY TO REMOVE SNOW AND ICE FROM CROSSING. — It is not negligence for a municipal corporation to permit a street crossing to remain incumbered with ice and snow that was practically impossible to remove because of its frozen condition, and that had become so immediately after the fall of snow four days before the accident to the plaintiff.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff.

THEODORE CONNOLY, for appellant.

EDWARD SWANN, for respondent.

RUMSEY, J. — On Sunday afternoon, the 30th day of December, 1894, the plaintiff, while walking down Fifth avenue, on the west side, reached the crossing of Fifty-sixth street. That crossing was covered with ice and snow, packed down and frozen in ridges along

the crossing. The plaintiff observed the condition of the walk, and sought for a place where she might cross with safety. She stepped carefully off from the curb, but, just as she took the second step from the crossing, her foot slipped upon one of the ridges of ice, and she fell and broke her leg. To recover the damages received by the fall she brought this action. Upon the trial she had a verdict, and a motion for a new trial made by the defendant upon the judges' minutes was denied. After the entry of judgment, this appeal was taken from that judgment and order.

The injury was received between four and five o'clock in the afternoon. It appeared, from the evidence of the plaintiff's witnesses, that during the month of December, down to the 26th, the temperature had been above the freezing point nearly all the time. On the afternoon of the 26th a fall of snow began, which continued until late in the night, when it turned to sleet, and afterwards to rain, which ended about noon of the 27th, when a fall of snow began again, which continued until half past one of that day. The total fall of snow during the 26th and 27th was eight and two-tenth inches. On the 27th, after the snow-fall ended, the thermometer began to fall, so that at some time on that day it descended to sixteen degrees above zero, the mean temperature on that day being about twenty-eight degrees. The thermometer continued below freezing from the 27th down to the 31st, and there was no time during those days when the snow which fell on the 27th was not frozen to the sidewalks and streets. The plaintiff met with her accident on the crossing of the roadway of Fifty-sixth street. There was no loose snow there, but the crossing was covered, as has been stated, with frozen snow and ice, so that it was slippery. No claim is made by the appellant that the plaintiff was guilty of any contributory negligence in attempting to go over the crosswalk as she did, but a reversal is claimed solely upon the ground that the city was not guilty of negligence in permitting the crossing at Fifty-sixth street, upon which the plaintiff fell, to be incumbered with snow and ice, while the temperature was so low that the coating adhered to the pavement, and could not conveniently be removed. We think this contention is well founded. It is not necessary to consider precisely what duty is imposed upon a municipal corporation by way of keeping the street crossings in a safe condition for pedestrians who have occasion to use them. It is certainly no greater than the duty imposed upon them with reference to sidewalks. As to them, the municipality is bound only to use reasonable care to keep them in a safe condition. It often happens that a fall of rain is suddenly followed by severe cold, by reason of which the snow or ice is frozen to the

sidewalk, so that it is practically impossible to remove it until a thaw has come. In such case, the rule is that the municipality is not negligent in awaiting the thaw. The emergency is one which is common to every street in the city, and which the corporation is powerless to remove, and the municipality may await, without negligence, a change of temperature, which will remove the danger. *Taylor v. City of Yonkers*, 105 N. Y. 209, 11 N. E. Rep. 642. The rule laid down in the case cited has since that time been invariably followed in the courts. The case at bar is controlled by the principle there established; and, applying that principle, we are quite clear that the city was not guilty of any negligence by reason of the facts made to appear by the plaintiff's witnesses.

It was erroneous, therefore, to refuse to dismiss the complaint because the defendant was not shown to have been guilty of negligence. For this error the judgment and order must be reversed, and a new trial granted, with costs to the appellant to abide the event of the action. All concur.

QUINN v. PIETRO.

*Supreme Court, New York, Appellate Division, Second Department,
March, 1899.*

COLLISION OF WAGON WITH BICYCLE—DEATH OF BICYCLIST.—

Where it appeared that a boy sixteen years of age riding a bicycle kept to the right of the highway, and the defendant, instead of keeping to the right of the middle of the road, changed his course to the side where the boy was who in vain endeavored to avoid a collision by going nearer to the curb, and was knocked off his bicycle by the pole of the wagon and run over and fatally injured, his death was due to the gross negligence of the defendant.

EVIDENCE—DECLARATIONS OF DRIVER OF WAGON.—Evidence that the defendant after he was arrested swore at the bicycle and said they were no good was properly admitted as tending to show his hostility to bicycles in general, and indifference to the rider's rights in particular.

VERDICT.—A verdict for \$2,000 for the death of a boy sixteen years of age was not excessive.

APPEAL from judgment, Supreme Court, Trial Term, Kings County, in favor of plaintiff.

A. F. VAN THUN, JR., for appellant.

JAMES D. BELL, for respondent.

WILLARD BARTLETT, J.—The plaintiff's intestate, a lad sixteen years old, while riding a bicycle on Eastern Parkway, in Brooklyn,

on a pleasant October afternoon, in broad daylight, was run down and killed by a team of horses drawing a wagon load of manure, and driven by the defendant. The boy was wheeling westward along the Eastern Parkway, and kept to the right of the highway, ten feet from the curb. The defendant, who was driving eastward, instead of keeping to the right of the middle of the road, — which would have avoided any possibility of collision with the bicycle, — changed his course, and drove over to the left side, and down that side of the parkway, at a fast trot. As the wagon and bicycle approached one another on that side, the rider of the wheel appears to have directed his course nearer and nearer to the curb, for the purpose of avoiding the defendant's wagon, but in vain. The defendant also kept turning towards the gutter, until finally, at a distance of four feet from the gutter, the wagon pole struck the bicycle, and knocked off the rider, who was then trodden under the hoofs of the horses, and run over by the wagon wheels, suffering injuries which resulted in his death.

This narrative presents a view of the accident based upon evidence which is in the case, and which the jury may well have believed to be true. There is other evidence which, if credited, would have justified them in adopting an entirely different view, exonerating the defendant; but it is manifest that the jury refused to believe his testimony to the effect that he did not leave the right side of the street, and that the boy had his head down all the time he was approaching the wagon, until he struck it. I think the proof authorized the jury to find that the death of the plaintiff's intestate was caused solely by the gross negligence of the defendant.

The plaintiff was allowed to prove what the defendant said shortly after his arrest, when asked whether he knew the boy's bicycle, which had been brought to the police station. According to one witness, his answer was: "Damn the bicycle." According to another, he responded: "Damn the bicycle, anyway; they are no good." The objection to proof of these declarations was not well taken. The evidence tended to show the existence of a feeling of hostility to bicycles on the part of the defendant, which increased the probability that he had conducted himself with indifference to the rights of the rider of such a vehicle when he encountered the plaintiff's intestate, on the Eastern Parkway; and, in this point of view, the testimony was relevant, especially as there were circumstances indicating that the defendant might have wilfully brought about the collision.

The verdict was reasonable in amount (\$2,000), and the judgment and order refusing a new trial should be affirmed. All concur.

FLANAGAN v. ATLANTIC ALCATRAZ ASPHALT COMPANY.

*Supreme Court, New York, Appellate Division, First Department
February, 1899.*

UNSAFE PREMISES — TRESPASSER. — A teamster drove his team into defendant's yard for the purpose of hauling a load of asphalt, and while waiting for it he left his team standing and went to another part of the yard for a purpose of his own, and while standing by a gate was injured by it falling upon him. *Held*, that the defendant owed him no duty to keep the gate secure.

CONTRIBUTORY NEGLIGENCE. — The fact that the plaintiff left a place of safety and placed himself near the gate that was hung on rollers and that there was a possibility of collisions between it and the carts and trucks passing in and out, and that there were other places about the yard where the plaintiff could have gone instead of the selected place, made the question of his contributory negligence one for the jury.

APPEAL from judgment, Supreme Court, Trial Term, New York County, in favor of plaintiff.

PERRY D. TRAFFORD, for appellant.

G. WASHBOURNE SMITH, for respondent.

INGRAHAM, J. — The defendant maintains a yard on the north side of Fifty-sixth street, between Eleventh and Twelfth avenues, for the storage of asphalt, in the prosecution of its business. This yard is inclosed by a fence, in which there are gates, suspended by overhead wheels upon a piece of timber, and opened by being pushed back against the fence, so that when a gate is opened it is suspended from the timber overhead, and hangs upon the whels. The defendant had made a contract with one Mooney to cart asphalt from its yard. The plaintiff was in the employ of Mooney, and on the afternoon of September 3, 1896, he was just inside of one of the gates, waiting to load his cart with asphalt. There were other horses and trucks ahead of him in the yard waiting for a load. The plaintiff left his truck standing in line, and went up near this gate to relieve himself, and as he stood near this gate it fell upon him, causing the injury to recover for which this action is brought. There is evidence that the drivers of these carts were in the habit of going to the fence about the defendant's premises for this purpose, but no evidence that the defendant had knowledge of this habit of the men. There was evidence that, before the plaintiff was injured, the gate had come off the rollers and had several times fallen. One witness

testified that in opening the gate, it would run off the rollers, and others testified that they had seen the gate off the rods upon which the wheels ran. The gates were closed at night, and were opened in the morning by the first truckman that got there. At the time of the accident this gate was open to its full extent, so that the side of the gate was close to the post which supported the fence at the edge of the opening, and apparently had been open since the early morning. The accident happened between half past twelve and one o'clock. On behalf of the defendant there was evidence tending to show that on the January previous new hangers had been put on the gate, and the gate was made secure. One of the witnesses for the defendant noticed, immediately after the accident, that there was an indentation on the side of the gate which was not there immediately before, and that after the accident he saw that one of the hangers supporting the gate was broken off and the other twisted. There was no other evidence to show what occasioned the fall of the gate. Other drivers of trucks and carts testified that they saw nothing hit the gate before it fell. From the evidence it would seem that there was difficulty in opening the gate, and that when it was opened it would sometimes come off the rollers and fall down; but there does not seem to have been any evidence to show that the gate ever fell after it was opened, or if it were not touched. The court, at the request of the plaintiff, submitted the question of the defendant's negligence to the jury, and charged the jury that "if the jury find that the gate was in a defective condition, and the defendant knew, or in the exercise of ordinary care should have known, of its defective condition, it was the duty of the defendant to have repaired the gate, so that it would be in a reasonably safe condition, and failure on its part to do so would be negligence; and if the plaintiff received his injury through the negligence of the defendant, your verdict must be in his favor;" and that "there is no evidence in the case to show that the plaintiff was guilty of contributory negligence." To these instructions the defendant excepted.

We have the case of a person upon the premises of another, voluntarily and for his own purpose leaving a place of safety and going to another place. There was nothing that required him to select this particular position near the gate; nor is there anything to show that the defendant anticipated that the workmen employed upon the carts would place themselves in such a position as to require it to guard against the gate's falling. When in that position, the plaintiff was injured by an unexplained accident, for which the plaintiff's testimony gives no cause. The first question presented is whether the defendant owed any duty to the plaintiff to keep this gate when open

in such condition that it could not fall, so that a neglect to perform such duty would give the plaintiff a cause of action against the defendant. In the first place, there was no contractual relation between the plaintiff and the defendant. The plaintiff was not in the employ of the defendant, and the obligations which are imposed upon an employer to furnish to his employee a safe and proper place to work are not applicable. Undoubtedly, the defendant, having made a contract with the plaintiff's employer to do certain work which required the plaintiff to go upon the premises, was bound to exercise care so that the plaintiff, while upon the premises in discharge of the work which he was employed to do, would not be injured, and a failure to exercise such care would be negligence for which the defendant would be responsible. This duty to the plaintiff, however, only existed as to the premises to which the plaintiff was required to go in the performance of the contract between the defendant and the plaintiff's employer. The plaintiff was not bound to anticipate that these workmen would leave their carts and go to a part of the yard to which they were not required to go in carrying out the contract between the defendant and the plaintiff's employer, or that the plaintiff would use this gate or fence for the purpose for which he did. So long as the plaintiff remained upon his cart, or was engaged in the performance of the work which he was employed to do, he was perfectly safe; and, assuming that this gate was defective and liable to fall without any apparent cause, there was nothing to justify an inference by the defendant that any of these workmen would place themselves under it in a position to be injured if it fell. We are considering a duty that this defendant owed to the plaintiff. It is certain that no work that the plaintiff was called upon to do required him to use this part of the yard, and there was no invitation of the defendant to the plaintiff, express or implied, to use this gate or fence for the purpose for which he did use it. It is said that the defendant provided no water closet for the men; but it was under no obligation to do so, and its failure to furnish such convenience was certainly no invitation to the workmen to use any portion of the premises that they saw fit for such purpose. It is difficult to see, therefore, what duty the defendant owed to the plaintiff in connection with this private purpose. The plaintiff was not there engaged in the performance of any work which he was employed to do, but he went there to use the defendant's premises for a purpose for which it was not intended, and without the defendant's permission. The case of *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. Rep. 987, would seem to be decisive of this question. In that case the plaintiff, while descending a stairway leading from

the rear of a house to the ground, in consequence of the breaking of a step, was injured. The premises were owned by the defendant, but occupied by a tenant. The plaintiff occupied the adjoining house. The premises were separated in the rear by a fence, through which an opening had been made. The defendant knew that the steps were out of repair, and promised to repair them. It was held that the defendant was not liable the court saying: "It may be observed, in passing, that the owner may ordinarily exercise such dominion over and make such use of his real estate as he chooses, provided the rights of others are not thereby violated. No right of the plaintiff was violated. The enjoyment of the premises occupied by her was not interfered with. Had she remained on them the injury would not have occurred. But she chose to go on private property, and up or down back steps, over which she had no authority, and as to which she had acquired no such interest, by contract or otherwise, as would have entitled her to demand as a right that the so-called nuisance be abated. As to her it was not a nuisance, because it did not invade either her property or personal rights. * * * It is urged that a recovery cannot be supported because the defendant negligently permitted the stairs to remain in an unsafe condition. The question is, therefore, presented: Did the defendant's duty require the exercise of any care to protect the plaintiff while on the premises?"

It was held that it did not; and the court quotes with approval *Severy v. Nickerson*, 120 Mass. 306, where a laborer employed in loading ice on a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway, and broke his leg. Devens, J., speaking for the court, said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and to one who enters upon lawful business, by the invitation, either express or implied, of the proprietor, is well settled. The former enters at his own risk; the latter has a right to believe that, taking reasonable care of himself, all reasonable care has been used by the owner to protect him in order that no injury may occur."

Here the plaintiff entered these premises upon lawful business by the invitation of the defendant. He had a right to believe that all reasonable care had been used by the owner to protect him upon the portion of the premises where his work required him to go, but when he left the portion of the premises upon which he was invited, and went over to this gate for reasons of his own, he went there at his own risk, and in that position he was not entitled to assume that the

defendant would use all reasonable care to protect him. The same principle is applied in the case of *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. Rep. 752. We think, also, it was error for the court to charge the jury that there was no evidence in the case to show that the plaintiff was guilty of contributory negligence. The plaintiff left a place of safety, and deliberately placed himself in the position in which he was injured, without invitation from the defendant. Viewing this act in its relation to the question of the negligence of the plaintiff, we think it should have been submitted to the jury. Considering the method by which the gate was hung, the position in which the plaintiff placed himself, the fact that horses and carts were standing in the gateway with a possibility of collisions happening between the side of the gate and the carts or trucks going in and out, and the fact that other places were available to the plaintiff in the neighborhood for the accomplishment of his purpose, without placing himself alongside the gate in the immediate vicinity of these horses and trucks, we think the question of plaintiff's negligence was for the jury.

"We are not permitted to guess or assume that the deceased was free from fault because he was injured, or that every person will take care of himself from regard to his own life and safety, for the reason that human experience shows that persons exposed to danger will frequently forego ordinary precautions of safety. It is incumbent upon the plaintiff to show, by a preponderance of evidence, such facts and circumstances as will satisfy the minds of the jurors that the deceased exercised proper care and prudence, and did not omit the precautions of a prudent man under the circumstances. The law demands proof and not mere surmises." *Riordan v. Steamship Co.*, 124 N. Y. 655, 26 N. E. Rep. 1027.

We also think that the court erred in charging the plaintiff's third request, that the defendant "was in duty bound to the plaintiff to use such safeguards in securing the gate as experience has shown to be safe." We do not understand that such a duty was imposed upon the defendant. The defendant was not confined to those appliances which experience has shown to be absolutely safe, but to those appliances which, under the circumstances, would appear to a reasonably prudent man to be a proper appliance to keep the premises in a safe and suitable condition, free from danger from those rightfully using them. To prohibit a person from using any appliances other than those that experience has shown to be absolutely safe would prevent anyone in possession of the premises from applying any device or apparatus which had not been used before, the absolute safety of which had not been demonstrated. We do not think that this is a

correct statement of the obligation. It follows that the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

All concur except O'BRIEN, J., who dissents.

O'BIERNE v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Supreme Court, New York, Appellate Division, First Department, February, 1899.

STRUCK BY DETACHED CAR AT RAILROAD CROSSING. — Where the plaintiff after looking up and down the tracks of a crossing and, seeing or hearing no car, drove across three of the four tracks in safety, and when thirty feet from the last track looked again and seeing nothing, kept on, and when the horses were on the track, saw a detached car approaching and kept on, and was struck by it, there being no signal or flagman, the questions of negligence were for the jury.

APPEAL from judgment, Supreme Court, Trial Term, dismissing the complaint.

The plaintiff was injured on April 4, 1894, on Eleventh avenue, in the city of New York. He was driving a wagon, and turned south into Eleventh avenue from Thirty-third street. Between Thirty-second and Thirty-third streets four tracks of the defendant cross Eleventh avenue, running from northwest to southeast. On both sides of the avenue are the defendant's freight yards. The plaintiff looked south, east, and west when he turned into the avenue, and again when but thirty feet distant from the track where the accident occurred; but no moving car was visible. When the horses were upon the track, he heard a crash to the east, and, looking up, saw a single, detached car, approaching rapidly, and about 100 feet distant. He shouted to the horses, and attempted to get across, but the car struck the rear wheel of the wagon and the plaintiff was thrown off and injured. There was no brakeman on the car, or flagman at the crossing.

L. E. WARREN, for appellant.

D. W. TEARS, for respondent.

BARRETT, J. — The plaintiff was nonsuited upon the ground that he should have kept looking to the east and west while passing over the thirty feet upon his side of the track where the accident occurred. No point was made as to the defendant's negligence. *A prima facie*

case on that head was clearly made out. *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

We think the question of contributory negligence was also for the jury. It is undoubtedly the duty of one who attempts to cross the track of a railroad at a point where rapidly moving trains are ordinarily to be expected to keep upon the lookout therefor. There is no absolute rule, however, requiring the traveler to use his eyes in a particular manner at a particular instant of time. *Oldenburg v. Railroad Co.*, 124 N. Y. 414, 26 N. E. Rep. 1021. The surrounding circumstances are always to be considered upon the question whether proper prudence was observed. It was said in *Palmer v. Railroad Co.*, 112 N. Y. 234, 19 N. E. Rep. 678, that the plaintiff "could not rush heedlessly on to danger, and throw the result upon the defendant, but the degree of care required of a traveler is increased or diminished by the greater or less probability, suggested by the circumstances about him, that without it an injury will happen." Applying this rule to the case at bar, we think it was for the jury to say whether the plaintiff was negligent. The locality was a public highway, which the defendant was using for purposes other than ordinary traffic. The plaintiff could have had no reason to anticipate the sudden appearance of a rapidly moving train or car. He testified that as he approached the tracks he looked "up and down and over" them. No engine or car then appeared to be anywhere in motion. In fact, all was silent in the neighborhood. It was quite early in the morning. There was no signal or flagman. The plaintiff passed over one or more of the tracks in safety, and without incident of any kind. He then found himself within but thirty feet of the remaining track. Here again he looked to the east and west, and discovered no element of danger. Apparently there was none. It was while he was passing over this remaining thirty feet that the defendant executed the manœuver whereby a single car was put suddenly into rapid motion without a brakeman to control it, or warning to passengers upon the thoroughfare. The jury might properly have found that the plaintiff could not have anticipated this sudden danger, and that he was justified, under the conditions which preceded it, in supposing that he could, in a few seconds, pass over the remaining track quite as safely as he had passed over the others.

The nonsuit was erroneous, and the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

KARLSON v. HEALY.

*Supreme Court, New York, Appellate Division, Second Department,
March, 1899.*

LANDLORD AND TENANT — INJURY TO TENANT WHILE ON ROOF. —

It cannot be said as matter of law that the plaintiff was guilty of contributory negligence for the continued use of a roof of a tenement house provided by the landlord with a flooring of slats and with poles for drying clothes, where it appeared that the plaintiff was aware that some of the slats were in a rotten condition, and that the landlord had promised to repair them, and the plaintiff, a tenant, was injured by the breaking of a slat that was not previously broken.

APPEAL from judgment, Supreme Court, Trial Term, Kings County, dismissing the complaint.

HENRY M. DATER, for appellant.

EDWARD M. GROUT, for respondent.

WILLARD BARTLETT, J. — The determination of this appeal depends on the question whether the trial court was justified in dismissing the complaint on the ground that the plaintiff had been guilty of contributory negligence. The plaintiff and her husband were tenants in an apartment house owned by the defendant. Upon the roof of the building was a fenced flooring of slats, with poles erected thereon, for the use of the tenants in drying clothes. The plaintiff was injured, while hanging out her wash, by falling through this flooring in consequence of the breaking of a slat upon which she stepped. There was abundant evidence that this roof flooring had been in a bad condition for weeks before the accident, some of the slats being rotten, and others broken, and that the landlord had been repeatedly informed of the defects, and had promised to have them repaired. That the plaintiff was aware of the condition of the roof was also clearly established. This fact, however, did not make it contributory negligence, as matter of law, on her part, to continue to use it, so long as it appeared to her that she might safely do so with the exercise of care. The learned counsel for the respondent argues that there is no proof that this roof was the sole place for drying clothes, or that there were no other means in the building for that purpose. The plaintiff, however, testified thus: "The arrangements made for hanging clothes on those premises were that we had to take the clothes on the roof, and dry them on the roof." We think it might be inferred from this statement that no other place had been provided by the landlord. The plaintiff's

testimony further indicates that she was acting with prudence and circumspection at the time she was hurt. The slat which gave way under her was not previously broken. Its appearance was like that of the other slats. "I walked very carefully," she says, "we have to be very careful when we have to be up there, because I was afraid; and I was very careful when I was up there that I should not fall." As Judge Bradley said, in *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. Rep. 1077: "While the question may have been a close one of fact, it could not properly be held, as a matter of law, that the plaintiff was guilty of contributory negligence." In the case cited the tenant was injured by falling on a stairway common to the occupants of the defendant's tenement house, and the same rule of liability applies to a landlord in respect to negligence in the maintenance of a slatted roof provided for the use of his tenants in drying their clothes. *Alperin v. Earle*, 55 Hun, 211, 8 N. Y. Supp. 51. It was error to dismiss the complaint in this case, and the judgment should be reversed.

Judgment reversed, and new trial granted; costs to abide the event. All concur.

LOUIS V. EUREKA CLUB.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1899.*

ICY SIDEWALK — INJURY TO PEDESTRIAN. — Evidence that water from the defendant's roof was allowed to flow along the driveway and cover the sidewalk and there freeze and that defendant's servants cut a gutter to facilitate the discharge of the water over the sidewalk where it formed thick ice, on which plaintiff slipped and fell and was injured, was sufficient to authorize a finding of defendant's negligence, and a nonsuit was error.

APPEAL from judgment of nonsuit, Supreme Court, Trial Term, entered at close of plaintiff's evidence.

DAVID N. SALISBURY, for appellant.

DAVID HAYS, for respondent.

FOLLETT, J. — This action was begun February 14, 1895, to recover damages for personal injuries caused, it is alleged, by the negligence of the defendant. The defendant is a domestic corporation organized as a social club, under chapter 267 of the Laws of 1875, which was repealed, except section 7, by chapter 559 of the Laws of 1895 (Membership Corporation Law). During the year

1892 the defendant was the owner and occupant of a club house on the west side of North Clinton street, in the city of Rochester. On the north side of the club house was a driveway by which carriages entered the grounds of the club from the street and returned from the grounds to the street. January 16, 1892, the plaintiff, then aged twenty-eight years, was employed in the store of Sibley, Lindsay & Curr; and in returning to her home from the store in the evening of that day she slipped on the ice which had been allowed to accumulate on the sidewalk at or near the driveway, and broke one of the bones of her left ankle, causing her great pain and much loss of time, and from the effects of the injury she has never recovered. It appears by the undisputed evidence that the water which came from the north side of the defendant's roof was allowed to flow along the driveway and cover the sidewalk, and there freeze. The defendant's servants, to facilitate the discharge of water from its grounds, cut a gutter, which gathered the water and carried it onto and over the sidewalk. This gutter or channel is said to have been about a foot in width. The plaintiff testified that she thought the stream of water which had been allowed to flow over the sidewalk when she had previously passed by there was about two inches deep, and that it continued to run until it froze. She testified that when she passed over the walk at noon of the day of the accident the sun was shining and the water flowing, and that the water ran down the walk towards Franklin street, and across the next driveway into the gutter in front of the next building. She testified that the ice was in ridges, with a rough, uneven surface; that the gutter was cut down into the ice and snow as far back from the walk as she could see. The plaintiff's sister testified that in the afternoon of the day of the accident she passed this driveway, and that the ice on its surface was very thick, and the gutter through which the water flowed from the grounds of the club was visible, and that she had seen water flowing through it. She testified that the ice was thick — six inches in places, often more — and "humpy." Bertha Ihrig testified that January 16, 1892, between twelve and one o'clock, she passed by the club house, and saw water flowing over the sidewalk in front of defendant's driveway, which came from defendant's grounds; that there was ice on the walk over which the water was flowing, and that it was then freezing; that she had trouble in passing over the walk, and nearly slipped and fell. She said that the water, when it reached the sidewalk, flowed all over it, on both sides of the driveway in front of the club, and in front of her sister's place, which was the next house north. Ernest L. Miller testified that he resided in January, 1892, in the house next north

of the club, and had lived there for sixteen years; that prior to the 16th of January he had been confined to his bedroom, which faced towards the club house, and that he saw defendant's employees working about the grounds on the morning of the day of the accident, saw them picking there, and saw lots of water running down into the cellarway of the club. Emma Miller testified that she passed along the walk on the 16th of January, 1892, and that she stepped into a lot of water running across the sidewalk at the driveway, and that the water came from the club-house property, and that she fell on the walk by the club house. Augustus C. Danks testified that he observed the walk in front of the club house two or three days before the accident, and shortly after the accident, and that he saw water running from defendant's land down the driveway over the sidewalk, and freezing as it ran, and that he saw a person cutting a channel from the back of defendant's grounds down to the street on the north side of the driveway, and that he saw the water running through this channel across the sidewalk. He testified that he was a plumber, and that he saw water coming from a conductor pipe leading into the ground, and that water came right up out of it; that the conductor led the water from the roof to a sewer; that the water, instead of entering the sewer, flowed through the gutter over the sidewalk. Other evidence of the same character was given, but I think enough has been quoted to show that there was evidence which would have authorized the jury to have found that the defendant was negligent in permitting water to flow from its grounds over this sidewalk for this length of time, and allow it to freeze there. The evidence in the case is sufficient to authorize the jury to have found that the plaintiff did not by her own negligence contribute to the accident. The court erred in granting a nonsuit.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur, except WARD, J., not voting.

CITY OF CIRCLEVILLE v. SOHN.

Supreme Court, Ohio, December, 1898.

MUNICIPAL CORPORATIONS — ICY SIDEWALK — DEFECTIVE PUBLIC WAY. — 1. The duty, enjoined by statute on municipal corporations, to keep their public ways open, in repair, and free from nuisance, is ministerial and mandatory, and requires the removal from such ways of all dangerous defects and obstructions, from whatever cause arising, when brought to the notice of the corporation.

2. The corporation is liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk under its control, after reasonable notice of its unsafe condition, though it arose from the construction or alteration of the street or sidewalk in conformity with a plan adopted by the municipal authorities.

SHAUCK, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Pickaway County. There was a judgment for plaintiff, and defendant brings error.

The petition alleges "that the defendant, the city of Circleville, Ohio, is a municipal corporation of the fourth grade of the second class, duly organized under the laws of the state of Ohio; that there is a certain street in said city, called 'Court street,' with sidewalks on both sides of the same, which have been constructed and maintained, upon grades established by said defendant, for the use of public travel by pedestrians having occasion to travel thereon; that the said street is, and was at the date hereinafter mentioned, one of the most public streets in the said city, and that the said sidewalk, at the points hereinafter named, was a greatly frequented place, and much traveled by the general public, being within two squares of the business center of said city; that on the west side of said street, between Mound and Union streets, there is an alley, called 'South Boundary Alley,' extending from Canal street, and intersecting said Court street at a point between the lots of G. F. Wittich and Dorothea Turney; that, from a point near St. Philip's Episcopal Church to the said Court street, said alley descends and slopes rapidly, and where the same crosses said sidewalk it has a slope of at least two feet in sixteen feet, thereby making said slope dangerous for persons traveling thereon, in times when the same is covered with ice and snow; that said sidewalk at said point, crossing said alley, is constructed in a dangerous and defective manner, by reason of said unusual and abrupt slope, and having rough and uneven stones thereon, and between which there are large fissures; that the same is so constructed at said point as to have a depression or gutter in the middle, for the purpose of permitting and allowing drainage on and through said alley, from said Episcopal church, and from lots adjoining on said alley, and over said sidewalk, and emptying into a gutter running along the said Court street, between the said sidewalk and the street proper; that in times of rainfall there is a large flow of water over and through said alley at said point, and in times of freezing the said sidewalk at said point becomes covered with ice from said drainage, and also from the drainage from lots adjoining on both sides of said alley, thereby making said

sidewalk, from all said causes aforesaid, unusually-dangerous to persons walking thereon; that said alley and said sidewalk have remained in said condition, as to the construction thereof, for a great many years, to wit, for at least ten years, with the full knowledge of the defendant of all the conditions aforesaid; that accidents have frequently happened at said point, to persons walking on said sidewalk, by said persons slipping and falling, when the same was covered with ice and snow; that the said G. F. Wittich and the said Dorothea Turney have, with the knowledge and consent of said defendant, for a long time prior to the injury hereinafter alleged, to wit, for at least ten years prior thereto, and at the time said injury occurred, used said alleyway as a means of drainage for their slops and surplus water, coming from their said premises, and the same has been allowed and permitted by the defendant to flow over and across said sidewalk, and into said gutter, continuously, for the said period of time aforesaid; that on or about the 16th day of March, A. D. 1895, and for more than a month next preceding, said defendant, with full knowledge of all the facts heretofore stated, had carelessly and negligently suffered ice, frozen snow, and sleet to accumulate on said sidewalk at said point, and the same was at said date dangerous to persons passing along the same, by reason of its slippery condition, and the defective condition of said sidewalk, as hereinbefore stated; that at said date aforesaid, about eight o'clock in the evening, this plaintiff was passing along the sidewalk, in the usual way, using all due care, and ignorant of its defective and dangerous and slippery condition, and while so walking she fell, and broke, fractured, and sprained her right limb near the ankle joint, and ruptured the ligaments, and otherwise injured her said limb; that by reason of the injury aforesaid she was laid up and confined to her bed for the period of five days, and has suffered great bodily pain and mental anguish, and was prevented for the last three months from attending to her business, and incurred about \$125 expense for medical attendance and nursing, in attempting to be cured of said injuries; and this plaintiff further avers that she is still lame and crippled from said injuries, and is only able to attend to her business by the use of her crutches, that the said injuries still exist, and that she will, as she verily believes, be and remain permanently lame, crippled, and disabled from said injuries."

By an amendment the following allegations were added to the petition: "That in consequence of the defective condition of the said alley, where the same crossed the said sidewalk, as it was at the time of her said injury, as described in her petition, and of the said unusual, abrupt, and dangerous slope thereof at said point, and

of the accumulation and flow of the water over and through said alley and across said sidewalk, from the sources and causes as averred and described in her petition, and the freezing of the said ice and snow thereon, in the defective condition of the said sidewalk at said point, at the time of said injury, so caused and brought about by the negligence of said defendant, and by the negligence of the said defendant in permitting the same to be and remain in said condition, the said plaintiff became and was injured, as described in her petition."

The defendant answered, denying, substantially, the alleged defective condition of the sidewalk, and all negligence on its part, and charging the plaintiff with contributory negligence. The plaintiff controverted the allegations of contributory negligence, and upon a trial of the issues thus joined the defendant prevailed. The judgment in its favor was reversed by the circuit court, for error in the charge, and in refusing to give instructions requested by the plaintiff.

The charges so held erroneous are as follows: "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, then the defendant cannot be held liable." "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, and not by any failure to repair the same, or a defect in its construction after the plan was adopted, then the defendant cannot be held liable." "The city had a right to open out the alley, and to construct said sidewalk, and the alley crossing which intersects it at that point; and if you find, from the testimony, that the alley crossing complained of was constructed in a reasonably safe manner, according to a plan enacted by the city council of the city of Circleville, and that it has remained substantially in that condition since, and was so at the time the injury complained of took place, and that the defect, if any, was in the plan, and not in its construction, or the want of repair on the part of the city, but that the injury complained of occurred and was caused by the adoption of a plan which, I have stated before, was reasonably carried out, and substantially built according to the plan, then and in that case the plaintiff cannot recover."

The instructions requested and refused are as follows: "If you find, from the evidence, that the accumulation of ice on the pavement, where the same crossed over South Boundary alley, combined with the defective condition of said alley at said point, and that the municipal authorities knew, or should have known, of its defective condition, then and in such case I charge you that the city is liable, unless you find that the plaintiff was guilty of contributory negligence in going upon said pavement at this point." "The duties of

the municipal authorities of this state to keep the streets, alleys, and sidewalks of the municipality for which they act in repair are ministerial, and not legislative; and, although they may exercise their discretion as to whether such improvements shall be made, yet, when they do decide to make them, the law requires that they shall be made in a reasonably safe condition for public travel, and, in their acts in constructing the streets, alleys, and sidewalks in such a manner as to be reasonably safe for public travel, the municipality for which they act may be held liable." "The law of this state imposes upon the municipal authorities the duty of making and keeping the sidewalks of the municipality in reasonably safe condition for persons walking along and over them, and in the performance of this duty the authorities act in a ministerial capacity, and for their negligence in the performance of their duty the municipality for which they act may be held liable." "The same duty was imposed upon the defendant, through its municipal authorities, to make and keep in a reasonably safe condition the sidewalk where it crossed over South Boundary alley, as the other parts of said pavement."

The case is brought here on error by the city.

WILLIAMS, J. (after stating the facts). — The instructions given and refused by the Court of Common Pleas, for which its judgment was reversed by the Circuit Court, raise the question whether a municipal corporation is exonerated from liability for injuries caused by an unsafe condition of a public way under its control, which it has suffered to remain after notice, when the defect arose in the execution of a plan adopted by the corporation for a local improvement. Its immunity from liability is defended here on the ground that, in the adoption of plans for local improvements, municipal bodies are in the exercise either of a legislative power, which is discretionary and not subject to judicial control, or of a judicial power, and not responsible for errors of judgment. Cases are cited in support of the proposition, some of which place the exemption from liability on one of these grounds, and some on the other, but none on both. It is said in *Detroit v. Beckman*, 34 Mich. 125, that "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault is with legislative action." And in *Urquhart v. City of Ogdensburg*, 91 N. Y. 67, it is declared that the exercise of the power to make local improvements is quasi-judicial. The courts of these states, in numerous decisions, maintain respectively these divergent views of the grounds on which municipal corporations are not liable in such cases, but concur in holding

their nonliability; and on that question they are at variance with a large number of reported cases, especially of those decided by the courts of the Middle and Western states. In *Blyhl v. Village of Waterville*, 57 Minn. 115, 58 N. W. Rep. 817, it is held that "a municipal corporation is liable for an injury caused by having an unsafe sidewalk, the condition of which is due to the plan adopted for its construction, when the city could have remedied the defect, but did not do so." And in *Gould v. City of Topeka*, 32 Kan. 48; 4 Pac. Rep. 822, the court hold that a "city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a public or common nuisance." The same doctrine is maintained in Indiana, Iowa, and other states. We will not attempt a review or discussion of the cases on this subject. In their briefs, which show diligent research, counsel have collected the cases on both sides, and ably presented their different views. Text writers on the subject lean to the side of municipal liability in such cases. In *Dillon on Municipal Corporations* (volume 2, p. 1294), under section 1024, it is said: "Does the principle that actionable negligence cannot be predicated of the plan itself (*Id.* § 1046) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative." And in *Harris on Damages by Corporations* (volume 1, p. 165) that author says: "As to the liability of a city for damages for an injury resulting from a defective plan, the decisions are not all harmonious, but the weight of authority is now, perhaps, in favor of holding the city liable for defects in the plan as well as in the execution of the work." And see *Elliott, Roads & S.*, c. 20, and *Jones, Neg. Mun. Corp.*, c. 4, p. 67. It has been held in this state, in a number of reported cases, that municipal corporations are liable for injuries caused to property abutting on streets, by changes in their grades, notwithstanding the establishment of the grade was a lawful exercise of municipal authority, and the work was done in conformity with the plan so adopted. The court recognizes that in this class of cases it has taken ground in advance of some adjudications elsewhere, and its position is maintained on principle. The doctrine established by them has since been adopted and followed in several other states.

In *City of Dayton v. Pease*, 4 Ohio St. 80, the city of Dayton was held liable in damages for injuries to property resulting from the fall of a bridge, forming part of one of its streets over a canal, where the fall was owing entirely to defects in the plan of the bridge, which had been approved by the council, and the bridge was

constructed under its direction and in accordance with the plan. While the question here is not precisely the same as in that case, it is nearly so, and involves an application of the same principle. And, in view of the irreconcilable conflict of decisions elsewhere on this question, we are at liberty to adopt such rule as will best harmonize with those of this court and our legislation on the subject, and as to us seems most reasonable and practicable. Our statute in express terms places the public ways of each municipality in its control, coupled with a positive command to keep them open, in repair, and free from nuisances. In the performance of that duty the municipal authorities are required to remove and keep removed from its streets all dangerous defects, obstructions, and nuisances of every kind, as they may arise from time to time, from any cause. There is no exception from the requirement in favor of defects, obstructions, or nuisances which are placed, or caused to be placed, in a street, by the corporation, or by its officers or agents; nor is there any the less reason for holding the corporation liable for a disregard of its duty to remove such obstacles from its streets, when placed there by its own act or the act of its officers, than there is for making it answerable for its negligence in permitting similar obstacles to remain when placed in the street by other persons. The statutory duty is ministerial in its nature and mandatory in terms, and was imposed for the benefit of those having occasion to use the streets, so that they might use them with safety, and not for the benefit of the corporation, and ample means for its prompt and efficient performance are placed in the control of the corporation. While municipal legislation may be necessary in providing means and measures for the performance of the duty, as it is with respect to many strictly ministerial duties, its performance, or the omission to perform it, is not the exercise of legislative or judicial power; nor is it discretionary.

We are of opinion, therefore, that a municipal corporation should be held liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk, which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities. We express no opinion in regard to the weight of the evidence. There was not a total lack of evidence tending to support the issues for the plaintiff, and its sufficiency is for the jury under proper instructions, and for the lower courts.

Judgment affirmed.

SHAUCK, J., dissented.

BRUNELL v. SOUTHERN PACIFIC COMPANY.*Supreme Court, Oregon, February, 1899.*

FELLOW-SERVANTS — HAND-CAR APPROACHING EMPLOYEE WHO DID NOT HEAR IT COMING. — Where an experienced section hand was at work with other laborers on defendant's track about three-fourths of a mile from a station, which could be seen from where they were at work, as well as the track for the whole distance, and he knew that a hand-car would be run from the station to where he was at work, but the men on the car were not warned of the presence of men on the track, and while his back was turned towards it the car approached at the expected time, but he did not hear it because of the noise of the work on the track, until it was almost upon him, when he and the other laborers jumped from the track, and one of them dropped a tamping rod which was struck by the car and thrown against his leg and broke it, the injury was due to his own negligence and that of his fellow-servants.

APPEAL from judgment, Circuit Court, Multnomah County, in favor of plaintiff.

This is an action to recover damages for an injury alleged to have been caused by defendant's negligence. The plaintiff, an experienced section hand, about twenty-two years old, was at the time of the accident employed with other laborers in surfacing the track on a spur of defendant's railroad leading from Sheridan easterly to Sheridan Junction, and while so engaged a hand-car coming from Sheridan, propelled by bridge carpenters, suddenly came up behind plaintiff, who, with his fellow-laborers, jumped from the track; but one of them, in his hurry to escape danger, dropped his tamping bar, which, being struck by the car, was thrown against plaintiff, breaking his leg. It appears that a train left Sheridan each morning at six o'clock, and that no other train or engine could pass over the line during the day, unless it came from Sheridan Junction, in view of which the overseer in charge of the men with whom plaintiff worked placed a flag beside the track to the east of them, but none to the west. The injury occurred about three-fourths of a mile east of Sheridan, from which place the railroad is built in a straight line over an open, level prairie, and it was possible for plaintiff to have seen a moving hand car on the track anywhere between him and the station. True, plaintiff had been in defendant's employ only four days, but he knew that the men engaged in repairing bridges passed over the track on a hand-car, leaving Sheridan each morning at about seven o'clock, and returning in the evening. The negligence alleged as constituting the cause of action

consists in defendant's failure to place a signal beside the track west of the place where plaintiff was working, or to set a person to watch the approach of hand-cars coming from that direction. The answer, having denied the material allegations of the complaint, averred that the injury was caused by plaintiff's negligence and the carelessness of his fellow-servants. The cause, being at issue, was tried, resulting in a judgment for plaintiff for the sum of \$700, and defendant appeals.

W. D. FENTON, for appellant.

DELL STUART, for respondent.

MOORE, J. (after stating the facts). It is contended by defendant's counsel that the evidence introduced at the trial, the substance of which is hereinbefore stated, fails to show any breach of his client's duty, and hence the court erred in denying his motion for a judgment of nonsuit; while plaintiff's counsel maintains that defendant was in duty bound to exercise reasonable care to select a safe place in which plaintiff should perform the service demanded of him, but having failed to set a signal, or to place a person to watch the approach of hand-cars coming from the west, the place was rendered dangerous, in consequence of which the defendant is liable for the injury which resulted from its negligence in this respect.

One of the rules of the common law is that the master must exercise reasonable care to provide a suitable place in which the servant can perform the labor demanded of him, without being exposed to dangers which do not of necessity attend the exercise of the employment, and that the master cannot delegate the performance of this duty to a subordinate, and thus escape the effect of the latter's negligence, but that the person so selected to provide a suitable place, though he may be a fellow-servant of the person injured by his negligence, is *pro hac vice* a representative of the master. Busw. Pers. Inj. sec. 192; McKinney, Fell. Serv., sec. 29; *Anderson v. Bennett*, 16 Or. 527, 19 Pac. Rep. 765; *Knahtla v. Railway Co.*, 21 Or. 136, 27 Pac. Rep. 91; *Mast v. Kern (Or.)* 5 Am. Neg. Rep. 88, 54 Pac. Rep. 950; *Smith v. Car Works*, 60 Mich. 501, 27 N. W. Rep. 662; *Coombs v. Cordage Co.*, 102 Mass. 572; *Sweat v. Railroad Co.*, 156 Mass. 284, 31 N. E. Rep. 296; *Ryan v. Fowler*, 24 N. Y. 410; *Filbert v. Canal Co.*, 121 N. Y. 207, 23 N. E. Rep. 1104; *Kaspari v. Marsh*, 74 Wis. 562, 43 N. W. Rep. 368.

This rule, as applied to a railroad company, requires it, in providing a safe place in which to perform the labor demanded of a servant, to exercise ordinary and reasonable care — having regard to the hazard of the service — to put its roadbed and tracks in a

reasonably safe condition, and to exercise like care to keep them in repair and free from obstruction. *Railroad Co. v. Ogden*, 3 Colo. 499; *Railroad Co. v. Myers*, 11 C. C. A., 439, 63 Fed. Rep. 793; *Railroad Co. v. Johnson*, 27 C. C. A. 367, 81 Fed. Rep. 679; *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. Rep. 230; *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Calvo v. Railroad Co.*, 23 S. C., 526; *Torian's Adm'r. v. Railroad Co.*, 84 Va. 192, 4 S. E. Rep. 339; *Bessex v. Railway Co.*, 45 Wis. 477. To entitle a servant, however, to recover damages for an injury caused by the alleged negligence of the master in failing to exercise ordinary and reasonable care in putting or keeping in good condition the place in which the service is to be performed, the evidence must show that the master knew, or ought to have known, of the defect which rendered the place dangerous, and that the servant, notwithstanding he exercised ordinary and reasonable care to protect himself, was ignorant of the peril to which he was exposed. *Griffiths v. Docks Co.*, 13 Q. B. Div. 259 (1); *Thomas v. Quartermaine*, 18 Q. B. Div. 685 (2); *Railroad Co. v. Campbell*, 97 Ala. 147, 12 Southern Rep. 574; *Erskine v. Beet Sugar Co.*, 71 Fed. Rep. 270; *Richardson v. Cooper*, 88 Ill. 270; *Railway Co. v. Corps*, 124 Ind. 427, 24 N. E. Rep. 1046; *Matchett v. Railway Co.* 132 Ind. 334, 31 N. E. Rep. 792; *Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. Rep. 702; *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Laning v. Railroad Co.*, 49 N. Y. 521; *Mixer v. Coal Co.*, 152 Pa. St. 395, 25 Atl. Rep. 587.

The following cases, cited and relied upon by plaintiff's counsel to sustain the judgment, illustrate the legal principle that the defect which rendered the place dangerous was open, and the master could

1. In *Griffiths v. London and St. K. Docks Co.*, 13 Q. B. Div. 259, affirming 12 Q. B. Div. 493, the declaration was held insufficient for want of an allegation that the danger was known to the master and unknown to the servant.

2. In *Thomas v. Quartermaine*, 18 Q. B. D. 685, it appeared plaintiff was employed in a cooling room in defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. Plaintiff went along this passage to

pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. Plaintiff recovered judgment in the County Court, but the Divisional Court set it aside and directed judgment for defendant. *Held*, that the defense arising from the maxim "*Volenti non fit injuria*," had not been affected by the Employer's Liability Act, 1880, and applied to this case, that there was no evidence of negligence arising from a breach of duty on the part of defendant towards plaintiff, and that plaintiff was not entitled to recover. Lord Esher, M. R., dissented.

have discovered it by the exercise of reasonable diligence, but the servant, relying upon the presumption that this duty had been fully discharged, was injured without knowledge of the peril to which he was negligently endangered: *Anderson v. Bennett*, *supra*; *Lewis v. Railroad Co.*, 59 Mo. 495; *Hall v. Railway Co.*, 74 Mo. 298; *Vau-train v. Railway Co.*, 8 Mo. App. 538; *Snow v. Railroad Co.*, 8 Allen, 441; *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Hulehan v. Railroad Co.*, 68 Wis. 520, 32 N. W. Rep. 529; *Davis v. Railroad Co.*, 55 Vt. 84. In the case at bar, however, the injury upon which the action is based was not caused by any defect in the place where the service was to be performed; but it primarily resulted from the negligence of the men who operated the hand-car, combined with the carelessness of the man who dropped his tamping bar. This presents the question whether, in view of the fact that plaintiff and his fellow-workmen were seen by the bridge carpenters in sufficient time to have avoided the injury, and considering that plaintiff knew that these employees would pass over the line that morning, it was a breach of the master's duty, in failing to place a signal, or to adopt some other means to protect the men at work on the track against accidents which might be caused by the negligence of those who operated hand cars. Signal flags are used by the company to notify the persons in charge of its locomotives that the roadbed or track is in a dangerous condition, requiring them to stop their engines, or admonishing them to proceed with care; and, to accomplish the object for which these tokens are designed, prudence dictates that they should be placed at such a reasonable distance from the point of peril as to enable the engineer and those associated with him to get such control of its train as to be able to stop it or slacken its speed before reaching the defect which renders further progress dangerous. The chief purpose which these danger signals serve must necessarily be to protect the lives of those who operate, or are passengers on, the train, which, by reason of its great weight and rapid movement, creates such momentum that it cannot be checked at once, so as to permit the persons who are riding thereon to safely leave it in time to escape injury. A hand-car, however, is of little weight, and can ordinarily be stopped much easier than a train; and hence it would seem that, since the quantum of duty is always commensurate with the degree of danger, the necessity for using signals to protect the lives of persons who ride on hand-cars is not so urgent as in case of employees and passengers on a swiftly moving train. It is the servant whose time and attention are so much occupied in the management of dangerous instrumentalities, as a means of advancing the master's business, that he cannot

investigate for himself the condition of the place in which his service is performed, who is entitled to special notice of any defect therein that would tend to render it dangerous, but the rule can have no application to an employee of age and experience, who is not hurried in his work, or is as conscious of the danger to which he is exposed as the master can possibly be; and, hence, the reason failing, the servant who works on the track is not entitled to the same degree of consideration as those who are compelled to perform their duties under greater difficulties. Persons employed in repairing a railroad track can leave it at pleasure in most instances, but not so with a train which must hurriedly pass over the line at frequent intervals, to accommodate the public; hence the duty of yielding the track must devolve upon the sectionmen, who are required to watch the approach of trains. *Larson v. Railway Co.*, 43 Minn. 423, 45 N. W. Rep. 722. The necessity for vigilance on the part of the sectionmen does not relieve the employees in charge of the train from all obligation to be watchful on his account; for, as was said by Mr. Justice Fly in *Railroad Co. v. Arias*, (Tex. Civ. App.) 30 S. W. Rep. 446: "There is a reciprocal duty existing between the railroad company and the employee at work on the track — the one being that the railroad company must give signals, where the nature of the locality requires, and, in case there is danger of injuring the employee, to use diligence to prevent it; and the other being that the employee must keep an outlook, and seek safety from trains that may be passing." The rule announced in that case, which seems reasonable, would require the engineer to blow his whistle at curves, cuts and other dangerous places on the line to notify persons working thereon of the approach of the train, and, in proportion to the degree of danger, it is quite probable that those who operate a hand car should be required to give some notice of its approach, where a view of the track is obscured; but, this obligation not being within the class of duties which are enjoined upon the master, when a railroad company has adopted and promulgated rules for the protection of its employees under such circumstances any failure to comply therewith is the negligence of a fellow-servant — a risk which the employee assumes when he enters upon the service. Under the rule that the master must exercise reasonable care to furnish a safe place in which the servant performs his labor, the employees who operate trains are entitled to notice by the master of any defect in the roadbed or track which could be discovered by reasonable diligence, but this rule cannot be invoked with like reason in favor of an employee who works on the track, for to give it that effect would tend to render it unnecessary for him to

exercise any vigilance to discover the approach of trains; and hence, in our judgment, so far as the plaintiff is concerned, the defendant was not negligent in failing to set out a danger signal towards Sheridan, as a warning to the men who operated the hand-car. We are led to this conclusion for the following reasons: 1. The track was not dangerous. The condition of the place in which the service is to be performed, which renders it dangerous, must be some defect in the soil itself, or in a structure which rests thereon or is in some manner attached thereto. 2. Plaintiff was aware of the danger. He knew that a hand car would pass over the road, coming from Sheridan, at about the time it arrived; but the reason he assigns for not perceiving it is that the car came up behind him while his attention was engrossed in the work upon which he was engaged, and that the noise made by the use of the tamping bars and other tools in surfacing the track so overcame the sound made by the car that he did not see or hear it in time to avoid the accident, which must render the excuse unavailing. 3. Plaintiff assumed the risk which caused the injury. While he had been in defendant's employ but a few days, he was nevertheless an experienced sectionman, accustomed to the work, and conscious of the dangers to which he was constantly exposed; and these risks he voluntarily assumed when he entered the service. One of the hazards to which he was necessarily subjected, and which his employment and service signify he was willing to bear, was the negligence of his fellow servants. 2 *Thomp. Neg.*, p. 969; *Miller v. Pacific Co.*, 20 *Or.* 285, 26 *Pac. Rep.* 70; *Stockmeyer v. Reed*, 55 *Fed. Rep.* 259; *Lindvall v. Woods*, 41 *Minn.* 212, 42 *N. W. Rep.* 1020; *Crispin v. Babbitt*, 81 *N. Y.* 516; *Slater v. Jewett*, 85 *N. Y.* 61; *Hussey v. Cogger*, 112 *N. Y.* 614, 20 *N. E. Rep.* 556; *Dube v. City of Lewiston*, 83 *Me.* 211, 22 *Atl. Rep.* 112. Judge Thompson, in his work on Negligence (volume 2, p. 1026), in defining the term "fellow servant," says "that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence." Under this definition, plaintiff and the men operating the hand car, as well as the overseer in charge of the surfacing gang, who tried to give warning of the approach of the car, but was unheard by plaintiff, were fellow servants; and this is also true when tested by the rule adopted by this court, that the character of the act, rather than the grade of the offending employee, determines such relation. *Anderson v. Bennett*, *supra*; *Hartvig v. Lumber Co.*, 19 *Or.* 522, 25 *Pac. Rep.* 358; *Miller v.*

Pacific Co., *supra*; Carlson v. Railway Co., 21 Or. 450, 28 Pac. Rep. 497; Fisher v. Railway Co., 22 Or. 533, 30 Pac. Rep. 425; Mast v. Kern, *supra*.

Plaintiff's failure to exercise watchfulness, combined with the negligence of his fellow servants, produced his injury; and, these being causes for which the defendant was not responsible, it follows that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

GOULD v. UNION TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1899.

BICYCLIST TURNING CORNER AND RUNNING INTO CAR. — Where it appeared that a boy riding a bicycle came around a corner, and a wagon being next the curb he attempted to go around it and then noticing a car approaching, and the space between the side of the car and the wagon being too small to admit of his passage, he attempted to turn back and at the same time dismount and the bicycle struck the car and the boy was injured, the fact that the motorman had his eyes turned to the other side of the street at the moment the bicycle came around the corner when it was too late to stop the car, would not justify a finding that the motorman was negligent (1).

I. In *SEWELL v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY* (*Supreme Judicial Court, Massachusetts, May, 1898*), 50 N. E. Rep. 541, a boy who attempted to cross a private street railroad crossing on a bicycle, without looking for a car, and without relying on being warned by signals, was held to be negligent.

In *TAYLOR v. UNION TRACTION CO.* (*Supreme Court, Pennsylvania, January, 1898*), 40 Atl. Rep. 159, it appeared that the plaintiff was riding his bicycle between the rails of the defendant's track upon which cars ran in the same direction as the plaintiff was going, and although he saw a horse and cart belonging to defendant company approaching at a rapid rate of speed on the same track he, as he thought he had the right of way, did not turn out until too late to avoid a collision, and was injured. The plaintiff relied

upon a statute which gave to a bicycle the character of a vehicle, and also upon an ordinance of the city which in ordinary cases gave to vehicles the right of way upon the tracks of the passenger railway companies in the direction in which the cars ordinarily ran. The court held that a bicycle was not a vehicle within the meaning of the ordinance and defendant was not liable. The court said that "under ordinary circumstances, the drivers of vehicles drawn by horses and the riders of bicycles must regard the ordinary rules of the road for each other's convenience and safety. I do not, however, think that such a rule would require that in an open unobstructed highway, a vehicle like a cart, for instance, should be driven to one side in order that the rider of a bicycle might be relieved of the necessity of deviating from a straight line."

APPEAL from judgment, Court of Common Pleas, Philadelphia County, in favor of plaintiff.

WILLIAM HENRY LEX and THOMAS LEAMING, for appellant.

HARVEY K. NEWITT and ELLERY P. INGHAM, for appellee.

FELL, J. — The plaintiff, a boy of twelve years of age, mounted on a bicycle, and riding at a speed of seven or eight miles an hour, came from Rodman street, a narrow street about midway in a block, into Tenth street, on which the defendant's cars ran in a southerly direction. He intended to turn north on Tenth street as soon as he reached the corner, but was prevented from doing so by a wagon which was standing between the curb and the car tracks. He went on directly into Tenth street until he had passed the end of the wagon, and when in the act of turning north around it he observed a car approaching, which was then very near him. The space between the wagon and the side of the car was too narrow to admit of his passage, and to escape from the danger in which he was placed he attempted to turn back, and at the same time to dismount. His bicycle struck the car at a point between the front and the center, and he was thrown down, and injured by the rear wheels of the car. The motorman had not seen the plaintiff until he reached the crossing. He had looked east in the direction in which the plaintiff was approaching, and at the moment of the collision his eyes were turned towards the crossing on the other side of Tenth street, in order that he might see if any one was approaching from that direction. The boy was not in a position in which he could have been seen by the motorman until the bicycle was within five feet of the tracks and about thirty feet of the car, and he had then turned so that the bicycle and the car were approaching each other. The collision was caused by the turning of the bicycle so that it ran into the car. These are the main facts presented at the trial, and there is practically no dispute as to them. There was the usual conflict of testimony as to the speed of the car. The only testimony that the speed was immoderate was given by a witness — a waiter — who said that it was running twenty-three miles an hour, but who admitted that it came to a stop within seventy five feet of the place of the collision, although the first notice of the motorman had been given by the jar as the rear wheels passed over the plaintiff's leg, after which he applied the brake as he looked around the end of the car to see what had happened. We see nothing in the testimony to justify a finding of negligence on the part of the motorman. If he saw, or by the exercise of reasonable care would have seen, the plaintiff in time to stop the car, it was his duty to do so. But it is clear that he did not see him, and it is equally clear that he was

not negligent in turning his eyes momentarily towards the other side of the street. He did this in the performance of his duty to watch both sides of the street. He was not, as was the motorman in *Harkins v. Traction Co.*, 173 Pa. St. 146, 33 Atl. Rep. 1044, indifferent to his duty, and looking at something at the side of the street, in which he had no concern. All of the witnesses agree that he was vigilant. Some said that he was looking straight ahead; some to the west. He testified that as he reached the crossing he looked first east and then west. During the moment when his eyes were turned from the east, the plaintiff came rapidly and noiselessly upon the street from behind a wagon, which was close to the track, with his bicycle turned so that he was facing the car, and then suddenly changed his direction, and struck the car. As before stated, the only testimony which tended to show undue speed was that of a witness, who evidently was making a mere conjecture about a matter of which he had no knowledge, and whose statement was effectually refuted by the admitted facts as to the stopping of the car. The speed of the car, however, did not cause the accident. The collision occurred within a moment of the time the plaintiff turned into Tenth street. If the car had been standing still, and the plaintiff had taken the same course, he would have run into it. His difficulty was that he could neither stop quickly, nor remain on his bicycle if he stopped; and this is the cause of injury in the great majority of cases of collision between bicycles and cars or wagons. The plaintiff was not misled by the movement of the car, nor surprised in an attempt to do what ordinarily he might have done with safety. He turned towards the car when it was then at his side, because he could neither go forward nor stop. The motorman was not, under the circumstances, negligent in not seeing him. If he had seen him, it was too late to avoid the collision.

The first specification of error is sustained, and the judgment is reversed.

PHILLIPS v. PEOPLE'S PASSENGER RAILWAY COMPANY.

Supreme Court, Pennsylvania, March, 1899.

COLLISION AT CROSSING BETWEEN TROLLEY CAR AND RUNAWAY HORSE THAT PLAINTIFF WAS DRIVING. — Where it appeared that the plaintiff was driving a horse that was running away and when he was sixty or eighty feet from a crossing he shouted to the motorman of a car to

stop his car which had not come to a full stop before starting to cross, and the motorman did not heed the warning, but continued to cross the street, and a collision occurred, there was no negligence shown on the part of the motorman whether he heard the warning shout or not, as even assuming that he knew the situation perfectly, being confronted with the sudden danger, it cannot be said that he was bound to do what after mature deliberation would have seemed the wisest thing to a prudent man. •

APPEAL from judgment, Court of Common Pleas, Philadelphia County, in favor of plaintiff.

DIMNER BEEBER, HAMPTON L. CARSON and J. LEVERING JONES, for appellant.

MILTON C. WORK and ALEX. M. DE HAVEN, for appellee.

FELL, J. — It appears from the testimony that the plaintiff's horse became unmanageable at Woodland avenue and Walnut street, and ran with him down Walnut, to the crossing of Fourth street, where the accident occurred. During all this time, although the plaintiff kept his seat, the horse was more or less beyond his control, and at the time of the accident it appears to have been a runaway, going at a high rate of speed. When from sixty to eighty feet from the crossing of Fourth street, and on the south side of Walnut street, between the curb and the car track, the plaintiff saw a car which was going south on Fourth street, and about to cross Walnut. As soon as he saw the motorman, the plaintiff called to him to stop the car. The motorman, however, either did not hear, or, if he heard, elected to do otherwise, for the car proceeded to cross the street, and the horse ran into it, causing the plaintiff's injury. We are unable to see in this testimony any evidence of negligence on the part of the motorman. There is no evidence that he heard the plaintiff call to him, or that he was otherwise made aware of the approach of the runaway horse. It was his duty, undoubtedly, to look for approaching cars and other vehicles which might collide with his car; but anything moving with the speed of a runaway horse was not to be apprehended, and he might very well have assured himself that none of the ordinary dangers of street crossings threatened him, without having either heard or seen the approach of the plaintiff. He had not brought his car to a full stop at the crossing, nor was there, as far as the testimony shows, any reason why he should. A motorman certainly cannot be required to stop at every crossing, and look for such extraordinary perils as the one in this case; nor can he be required to stop at all, unless the circumstances are such that it would be imprudent for him to do otherwise. In this case, it being Sunday, and the streets consequently comparatively clear of travel, and there being nothing on

Walnut street which, if moving at a reasonable rate of speed, would have collided with him. a full stop would have been entirely uncalled for. But, even assuming that he knew the situation perfectly, it cannot be said that he was bound, upon being confronted by so sudden and immediate a danger, to do what, after mature deliberation, would have seemed to a prudent man to be the wisest thing under the circumstances. Where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there must be not only a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, but also a reasonable opportunity to perform it. *Railroad Co. v. Kelley*, 102 Pa. St. 115. And what opportunity had this man? If he had any notice of the impending danger, it must have come to him when he was well started on his way across the street; and it is quite possible that he took the best course which could have been conceived upon such short notice. The outcome, it is true, was disastrous; but how could the jury say that he, with the duty uppermost in his mind of saving his passengers, if possible, from an imminent collision, did not judge — and that with reason — that his best chance of doing so lay in attempting to clear the runaway's course ahead of it? And how could they say that such a course would not have seemed to the majority of prudent men, if placed as he was, to have been the best? If he had stopped the car, it is probable that it would have lain directly across the middle of the street, or nearly so; and, if he knew anything of horses, he knew that no human foresight can predict the course of a runaway, even for a short space, and that the horse was as likely to attempt to go around his car at the rear as at the front, and that, if maddened by fright, it might dash into his car no matter in what part of the street it was.

The second assignment of error is sustained, and the judgment is reversed.

FLETCHER v. PHILADELPHIA TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1899.

MASTER AND SERVANT — CONDUCTOR ON FOOT BOARD OF OPEN
SUMMER CAR STRUCK BY PASSING CAR AND KILLED. — A street
railroad company is not negligent for failing to notify a conductor of nine

years' experience with closed cars, that there was danger when he was on the foot board of an open summer car, that he took out for the first time, of being struck by passing cars.

APPEAL from judgment of Court of Common Pleas, Philadelphia County, in favor of plaintiff.

THOMAS LEAMING, for appellant.

EDWIN O. MICHENER and GEO. W. HARKINS, for appellees.

DEAN, J. — Thomas P. Fletcher, father of these minor children, the use plaintiffs, had been a street-car conductor for nine years. Up to the 27th of July, 1895, he had run only closed cars, — most of that time on defendant's Ridge Avenue Line, which has two tracks, thirty-seven inches apart. Defendant also operated the Eighteenth and Twentieth Street Line, which is double track on York street, between Sedgely avenue and Twenty-second street. The distance between the tracks at that point is thirty-seven and one-half inches. About five o'clock in the afternoon of the day mentioned, the station master, Hargen, instructed Fletcher to take out an open summer car on the Eighteenth and Twentieth Street Line. He assumed charge of the car, and started on the trip. Soon after, a violent thunderstorm arose, and when York street was reached the rain was beating through the open car. Fletcher went out on the running board, and commenced pulling down the curtains at the sides. Just at that moment a closed car passed him on the other track. There was a crash, the car stopped, and he was found upon the road-bed, killed. Evidently, from the marks upon the body, he had been struck by the passing car. The plaintiffs brought suit, alleging negligence on part of defendant, in not warning Fletcher of the danger incident to the passage of an open and closed car on tracks only thirty-seven and one-half inches apart; he having before that run only on closed cars, and having, as alleged, no previous knowledge of the danger from experience or observation. The court below submitted the question of defendant's negligence to the jury; instructing them that if they found as facts that there was special danger from the nearness of the tracks at that point, which was increased by the greater width and arrangement of the open car, and that this danger, because of his inexperience, was unknown to Fletcher, then it was for them to say whether defendant was negligent in not warning Fletcher of the danger incident to his employment on an open instead of a closed car. There was a verdict for plaintiffs, and we now have this appeal by defendant, assigning for error the refusal of the court to peremptorily direct a verdict for defendant.

We think no authority in this State sustains the ruling of the court

below. Many of our cases hold that it is the duty of employers to warn young or inexperienced employees of dangers not obvious, but incident to their employment, and that the failure to do so is negligence for which the employer is answerable. *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. Rep. 226; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. Rep. 514; *Rummel v. Porter & Co.*, 131 Pa. St. 509, 19 Atl. Rep. 345, 346; *Wagner v. Chemical Co.*, 147 Pa. St. 479, 23 Atl. Rep. 772. But the deceased was neither young nor inexperienced. For nine years before his death he had been a conductor on a double-track line for this same company. Concede that he had never conducted an open car that necessitated walking on the running board along the outside; yet, from his long experience, he must have known the danger in passing another car on a wider one. The learned counsel for appellees in their printed argument state the inference more pointedly than we can, when they say: "The conductor's position on the closed car involves neither danger nor hazard of any kind, while that on the open summer car is one that — it is only stating a self-evident proposition, and a matter of everyday observation — is one of difficulty and danger to the most experienced conductor, while to an inexperienced one it is fraught with constant and extraordinary peril." The inexperienced conductor is one new to the business, and unaware of a danger not plainly noticeable. If the danger from an open car be a self-evident proposition, a matter of everyday observation, to those not engaged in the business, as argued by appellees, surely it must have been an obvious one to a conductor of nine years' experience on tracks where cars passed each other every few minutes. He knew the speed of the cars when passing in opposite directions; the narrowness of the space between the tracks; that to increase the width of the cars would increase the danger to the conductor passing along the running board. His knowledge must have been greater than that of the station master, for the latter conducted no kind of a car, open or closed. And the knowledge of the danger necessarily acquired from the servant's abundant opportunities for observation constituted the experience. The means of avoiding it were as plain to one man as another, for they were only such as ordinary intelligence would suggest; in passing, he must keep off the running board, or cling closely to the side of the car. In *O'Keefe v. Thorn* (Pa. Sup.) 16 Atl. Rep. 737, it was held that the employer was not bound to instruct a boy of fourteen that he must not put his hand under a stamping machine which he was employed to run, because such an act was so plainly dangerous that a boy of sufficient intelligence to run the machine knew it as well as his employer. The case before

us comes directly within the rule of *Bellows v. Railroad Co.*, 157 Pa. St. 51, 27 Atl. Rep. 685. There the plaintiff, a locomotive engineer, was placed on a new engine, the cab of which was six inches wider than the one on which he usually ran. He was not notified of the difference in width. In looking from the cab window, his head struck the side of a bridge. We held that there was no duty on the employer to notify an experienced engineer, transferred from one machine to another of increased width; of such facts he is bound to take notice. *Fulford v. Railroad Co.*, 185 Pa. St. 329, 39 Atl. Rep. 1115, was also a case where the width of the engine cab had been increased. The engineer was injured by a bridge, and brought suit for damages, averring negligence of his employer because of failure to warn him of the change in width. Being nonsuited in the trial court, we affirmed the judgment. We think the court below erred in not directing a verdict for defendant. Therefore the judgment is reversed, and judgment entered for defendant.

LAPORTE V. COOK, CITY TREASURER.

Supreme Court, Rhode Island, January, 1899.

MASTER AND SERVANT — CITY EMPLOYEE INJURED BY TRENCH CAVING IN — RISK OF EMPLOYMENT. — Where it was shown that a city employee who had been at work for about an hour in a trench six and one-half feet deep, was injured by the sides caving in, and the peculiar character of the soil was unknown to him, and that the trench had caved in in other places though the boss who directed him knew it, the question of contributory negligence was for the jury.

SAME. — Whether the city was negligent in failing to furnish sufficient boards to sheath the whole of the trench was for the jury.

FROM a judgment granting a nonsuit plaintiff petitions for a new trial.

WILLIAM G. RICH, for plaintiff.

ERWIN J. FRANCE, for defendant.

TILLINGHAST, J. — The evidence in this case shows that the plaintiff had only worked in the trench, where he was injured, for an hour or so when the accident happened; that he was directed by the boss or foreman in charge of the work to dig bell holes under the joints of the pipe which had been laid in the trench, which was six and one-half feet deep, in order that the joints could be properly caulked; and that, supposing the place to be safe, he proceeded to execute the order, and, while doing so, the bank suddenly caved in

upon him, and seriously injured him. The evidence further shows that the trench was curbed or shored up with boards a part of its length, but that there was no curbing in that part of the trench where plaintiff was injured; that no boards or other materials were furnished by the city for that purpose; that the boards which were used for sheathing or curbing were borrowed from a man who lived near by, and that not enough could be found to sheath the place in question; that the trench had previously caved, in two or three places, and some of the workmen had come near getting caught thereby, which fact was known to the boss, but not to plaintiff; and that the boss had been told by some of the workmen that the trench was dangerous. There is evidence that plaintiff was exercising due care when the accident happened, and that he had not been accustomed to dig trenches of this sort, — that is, of this depth, — but had dug shallow ones, where no curbing was necessary. In view of this testimony, we think the common pleas division erred in granting a nonsuit. The conduct of the plaintiff in going into the trench to dig the bell holes, as directed by his boss, was not, as matter of law, in view of the facts aforesaid, a negligent act. Nothing appearing dangerous to him in connection with the trench, he had the right to presume that it was reasonably safe, or, at any rate, that if there were special elements of danger, not obvious to ordinary observation, but known to his boss, he would be notified thereof. In this regard the case is materially different from *Larich v. Moies*, 18 R. I. 513, 28 Atl. Rep. 661, which is relied on by defendant's counsel. There the plaintiff knew of the danger in question. Moreover, in that case the danger from the overhanging bank was an obvious one, and, by continuing his work, the plaintiff assumed the risk of being injured from the falling of the bank. In the case at bar the plaintiff did not have the advantage of the knowledge of the peculiar character of the soil which the other workmen had acquired by digging therein, and much less that the bank of the trench had already caved in several places, but he was sent at once to the bottom of the trench, which was entirely new to him, to dig bell holes, and was almost immediately buried by the caving in of the bank. Whether he was guilty of contributory negligence in such circumstances was a question of fact for the jury. *Pilling v. Machine Co.*, 19 R. I. 666, 36 Atl. Rep. 130. It cannot be said, as matter of law, that the plaintiff assumed the risk when he was ignorant of facts on which, perhaps, a proper appreciation of the risk depended (*Breen v. Field*, 157 Mass. 277, 31 N. E. Rep. 1075), although, of course, he must be held to have assumed such risks as men of ordinary observation, accustomed to such work, would have known and appreciated under

the circumstances. As said by Lathrop, J., in *Lynch v. Allyn*, 160 Mass., at page 253, 35 N. E. Rep. 552: "The case was not one where a man was set to work to undermine a bank which was expected to fall by the law of gravitation, and where he was expected to look out for himself. In such a case we should have no doubt that the danger would be obvious." *Coan v. City of Marlborough*, 164 Mass. 206, 41 N. E. Rep. 238, was a much stronger case for the defendant than is the one before us, but the court held the question of assumed risk to be one of fact for the jury. In that case the court said: "Whether the plaintiff knew and appreciated the danger from the lack of proper shoring was a question of fact. He knew that the trench was not close-sheathed, and saw what portion of its sides were not covered; knew the nature of the soil and the depth of the trench, and that blasting was done to remove rock at the bottom, and that small quantities of earth frequently fell from the sides, and he had worked much in such trenches. These things make in favor of the contention that he knew and appreciated the danger, and assumed the risk of injury. But they are not conclusive, as there was evidence of other facts proper for the consideration of the jury. The plaintiff was a common laborer, working where he was told to work, and having no discretion as to where he should stand."

But defendant's counsel contends that, if there was any negligence in not having the trench properly sheathed or curbed, it was the negligence of the boss or foreman of the gang, who was a fellow-servant with the plaintiff, and hence that the city is not liable. In support of this contention he relies on *Hanna v. Granger*, 18 R. I. 507, 28 Atl. Rep. 659. That case holds that the character of the act, and not the rank of the person performing it, is the criterion of fellow service. The act in question there was the careless starting of an engine, which was the act of a servant, and not the duty of a principal. The negligent act here complained of, however, is the failure of the city to furnish proper appliances for the doing of the work. This was a duty which the defendant city owed to plaintiff, and one which it could not devolve upon a servant, so as to relieve itself from liability for its negligence (*Hanna v. Granger*, *supra*); and it is the failure to discharge this duty, and not the negligence of a fellow-servant, which forms the groundwork of the plaintiff's claim. If the city had furnished the necessary sheathing or curbing for the trench, and the boss or foreman had neglected to use the same, or had used it in a careless manner, and the plaintiff had been injured by reason of such negligence, the defendant's contention would be correct (it not being alleged in the declaration that the boss was

incompetent), as in that case the city would ha
to the plaintiff, and the negligence of the for
the appliances furnished would be the negligen
2 Bailey, Mast. Liab. secs. 2929-2936; Dube v
Me. 211, 22 Atl. Rep. 112; McDermott v. City
349; Clark v. Soule, 137 Mass. 380; Floyd &
563; Zeigler v. Day, 123 Mass. 152. But the
the city did not furnish planking or sheathing
also that a sufficient amount of boards coul
vicinity for use therein, although the characte
which the trench was dug, and the depth the
require the use of sheathing, or of some other
render the premises reasonably safe for the
reasons aforesaid, the case should have gone
the question of the defendant's negligence, as
plaintiff's contributory negligence.

Petition for new trial granted.

FRITZ ET AL. V. SALT LAKE ANI AND ELECTRIC LIGHT CO.

Supreme Court, Utah, February,

MASTER AND SERVANT — MACHINERY — DEF RULES NOT FURNISHED EMPLOYEE — DEAF

— 1. A master is not compelled to furnish employ
their government, guidance, and safety, when th
ment makes it dangerous, and the dangers incid
out of it are of common knowledge, are fully kno
the servant, and the safety of others cannot be
omission of his in the performance of his duties
wholly upon the degree of skill, care, and caution

2. A master is only compelled to furnish machinery a
safe and suitable, and such as are in general use
business in which the master is engaged.
3. In an action for damages for personal injuries, pla
action unless he shows, by some evidence, the neg
that such negligence was either the cause of
injury (1).
4. Where there are two or more methods or ways by
form his duties, and he voluntarily chooses the
it to be such, he does so at his own risk.

1. For a note of cases in point, see 5 Am. Ne

5. Where a servant engaged in a hazardous employment continues work for two weeks after an increase in the hazard, with full knowledge of such increase, he assumes the increased risk.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Salt Lake County, in favor of defendant.

This action was brought by the plaintiffs, Mary Fritz and August B. Fritz, heirs-at-law of Edward Fritz, who was killed August 16, 1896, while he was in the service of and at work for defendant in its electric light plant. The complaint in substance alleges that the death of the deceased was caused by the negligence of defendant, by reason of its failure and omission to promulgate and publish rules and regulations for the government, direction, and safety of its employees when working about the dynamos and electric machinery, and by permitting a certain dynamo or electrical machine to remain exposed, unguarded, and unprotected by insulation or by nonconductors or otherwise, and permitting an iron clutch or lever to remain within about twenty-four inches of the dynamo, and not covered with wood, or otherwise guarded or insulated. The answer denies the allegations of negligence on the part of defendant, and alleges that deceased assumed all the risks, and whatever injury he received was through his own negligence directly contributing to the injury. At the conclusion of the testimony for plaintiffs, the court, on motion of defendant, granted a nonsuit, and directed a verdict for defendant. The order granting a nonsuit is assigned as error, and is the only question in the case.

The facts, as shown by the record, are as follows: The decedent, at the time of his death, was, and for nearly four years prior thereto had been, in the employ of defendant, working in its electric light plant, oiling and taking care of the dynamos, which required his constant care and attention, as each machine had to be attended to every fifteen or twenty minutes. According to the description furnished by the record, a dynamo is nearly five feet high, and covers a space of about five feet in length by four feet in width. A part of the machinery, which we shall designate as the "lower magnets," is about two feet above the floor on which it rests. Another part of the machine is known as the "armature and brushes," which is about two feet above the lower magnets. And the upper part of the machine, which we shall designate as the "upper magnets," is about eight inches above the armature. The parts thus mentioned are highly charged and impregnated with electricity when the machine is in motion, generating the same. The risks of the employment consisted mainly of the danger of a person while in

the act of oiling and caring for the machinery with some part of the dynamo charged with electricity or some member of his body, and at the same time in contact with some other part of the machine or other member with some other member or portion of his body, thus making a short circuit or grounding the current through his body. Two weeks prior to the accident, the defendant removed a dynamo from another part of the building, and placed it standing near a live machine or dynamo; that dynamo was generating and charged with electricity — one which was cared for by the decedent. There was a moving lever attached to this dynamo so moved, which was used for starting and stopping the machine. The end of this lever was insulated or protected with wood, and when the lever was moved towards the live dynamo, it came within about six inches of it, leaving a space of about twenty-six inches between the live dynamo and that part of the clutch or lever which was protected with wood. When the lever was pushed in the opposite direction from the live dynamo, it was out of reach of it. The evidence does not disclose the exact position of the lever at the time of the accident. The decedent, who was in charge of the dynamo, could either pass between this machine to which it was attached and the live dynamo, or he could pass around on the opposite side of this live dynamo and thereby avoid all danger of coming in contact with the lever at the same time. The duties of the decedent required him to pass between the clutch and live dynamo. The decedent was last seen alive on the night of the accident, past nine and ten o'clock, and about forty minutes later he was found dead, lying near the lever above mentioned, and his hands showed signs of an electric burn, and there was a mark above the knee on the outside of the left leg. There was no one else near him, when the fatal accident occurred. The machinery was of the same kind in general use in other plants, and was in good condition and running at the time of the accident. The decedent was forty-two years of age, intelligent, capable, and thoroughly competent to perform his duties, and did understand and comprehend, the dangers incident to the employment and the operating of the machinery, and had been heard to express himself with regard to the danger of coming in contact with anything that would ground the current and make a short circuit through a person's body.

POWERS, STRAUP & LIPPMAN, for appellants.

BENNETT, HARKNESS, HOWAT, BRADLEY & RICHARDS, for respondent.

MCCARTY, DISTRICT JUDGE (after stating the facts). — Plaintiffs contend that it was the duty of the defendant to furnish its employees with printed rules for their government, guidance, and safety, and that its failure to do so was negligence. There are certain kinds of employment where, on account of their nature, it becomes necessary and is the duty of the master to promulgate and publish rules and regulations for the guidance and government and safety of its employees. Especially is this true where a large number of persons are at work, and the danger or safety of the employment depends largely upon all the employees performing their duties promptly, at stated times and in a given manner. But we do not understand the rule to apply to cases such as the one in question, where the very nature of the employment makes it dangerous, and the dangers incident thereto and growing out of it are of common knowledge, and are fully known to and understood by the servant, and the safety of others cannot be imperiled in any way by any act of omission of his in the performance of his duties, and his safety depends wholly upon the degree of skill, care, and caution used by himself, and not upon that of his fellow-servants. In this case the decedent, as shown by the evidence, thoroughly understood and appreciated the dangers incident and growing out of the employment. His work kept him in another part of the plant, separate and apart from his fellow-servants who worked on the same shift as himself, and whose duties were separate and distinct from his; and it is apparent, as shown by the record, his safety did not in any wise depend on the knowledge and skill of his co-employees, nor on the degree of care and caution used by them. In fact, it is not contended that the accident was due wholly or in part to any act of omission of his fellow-servants. Therefore the defendant cannot be held liable in this case on account of its failure to furnish its employees with printed rules, as the record shows conclusively that such failure did not in any way contribute to the accident. *Railroad Co. v. Carruthers* (Kan. Sup.) 43 Pac. Rep. 230.

It is further contended that defendant's failure to guard, protect, and insulate the dynamos was negligence. The machinery and appliances used by defendant in its electric-light plant before and at the time of the accident were of the kind commonly and ordinarily used in other electric-light plants, and the manner and methods of running and operating them were the same. The rule has become elementary that where a master has furnished the servant with machinery and appliances reasonably safe and suitable, and such as are in

general use for carrying on the same kind of business as the master is engaged, and the servant is injured by the master, the master cannot be held liable. If the master make use of some attachment or special device which rendered the operating of the machinery less dangerous, an accident thereby might have been avoided.

Railroad Co., 136 Pa. St. 618, 20 Atl. Rep. 51. In the considered case, the court said: "To show that the master does not prove it to be negligent. Some cases are especially hazardous, and it by no means follows that the master is liable because a particular accident might have been avoided by some special device or precaution not in common use. We agree that the master is not bound to use the most perfect appliances. He performs his duty when he furnishes appliances of a character and reasonable safety, and the fault is in the latter; for, in regard to the style of the implements and mode of performance of any work, 'reasonableness' is according to the usages, habits, and ordinary experience. Absolute safety is unattainable, and employment of the most perfect appliances does not insure against accidents. They are liable for the consequences, not of the accident, but of negligence; and the unbending test of negligence is the ordinary use of the appliances and appliances is the ordinary usage of the industry. One is held to a higher degree of skill than the fair and average man of the profession, and the standard of due care is that of an average prudent man. The test of negligence is the same; and, however strongly they may be convinced that the way is better or less dangerous, no jury can be allowed to depart from the usual way commonly adopted by those in the industry. Negligent way, for which liability shall be determined, necessarily determine the responsibility of the employer. They cannot be allowed to set up a standard of their own to dictate the customs or control of the business. *Bailey, Mast. Liab* p. 145; *Logging Co. v. S.* 390, 74 Fed. Rep. 195, and cases cited; *Car v. C. C. A.* 220, 79 Fed. Rep. 900; *Gilbert v. G. N. E. Rep.* 368; *Schroeder v. Car Co.*, 56 Mich. 220; *Nutt v. Railway Co. (Or)* 35 Pac. Rep. 1; *McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1. Further citation of authorities in support is unnecessary.

The only remaining question for our consideration is whether any evidence that tended to prove negligence on the part of the defendant by reason of the clutch or lever being

live dynamo? Just how the decedent came in contact with the dynamo, and caused the fatal current to pass through him, is a matter of speculation and conjecture. Counsel for plaintiffs insist that there was some evidence tending to show that decedent came in contact with the live dynamo with his hands, and at the same time came in contact with the clutch or lever with his left leg, and thereby grounded the current, with fatal results, and that this question, together with the other questions we have considered, should have been submitted to the jury. We have made a critical examination of the record, and fail to find any evidence whatever that supports this theory any more than it does the theory contended for by defendant, viz., that decedent met his death by coming in contact with the upper magnet with his hands, and at the same time coming in contact with the armature, brushes, or lower magnet with his leg. There is no evidence that tends to show the position of the clutch or lever before or at the time of the accident. For aught appearing in the record, it might have been out of reach of the live dynamo. To entitle the plaintiffs to recover, it was incumbent upon them to establish the negligence of defendant by some evidence, and that such negligence was either the cause of or contributed to the accident. Negligence cannot be presumed, nor the question thereof left to conjecture. In the case of *Sorenson v. Pulp Co.*, 56 Wis. 338, 14 N. W. Rep. 446, the learned court tersely, and, we think, correctly, stated the rule as follows: "Judicial determination must rest upon facts, and legal liability must be determined by the law in application to the facts. This rule will not exclude circumstantial evidence, for such evidence is often the strongest; but such evidence, after all, must establish facts. When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon such a plaintiff to furnish such evidence to show how and why the accident occurred, — some fact or facts by which it can be determined by the jury, and not left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single fact shown." *Sherman v. Lumber Co.*, 77 Wis. 22, 45 N. W. Rep. 1079; *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744, 39 N. W. Rep. 884.

There are other reasons why a recovery cannot be had in this case. The decedent's duties did not require him to pass between the lever mentioned and the live dynamo, nor was it necessary for him to do so. He could have oiled and cared for the dynamo on the opposite side from the lever, and thereby avoided all danger of coming in contact with both at the same time. When there are two

or more methods or ways by which a serv duties, and he voluntarily chooses the most to be such, he does so at his own risk. *Baile Iron Co. v. Brennan*, 20 Ill. App. 555; Same 369; *Cook v. Mining Co.*, 12 Utah, 51, 41 Pac. Carpita (Colo. App.) 40 Pac. Rep. 248; *Ri (Wash.)* 32 Pac. Rep. 1012; *Lewis v. Simp Rep.* 207.

For two weeks after this lever and the m attached were left near the dynamo, the de the increased dangers and risks, if any, caus to work there as usual, without complaint o continuing in the employment, he assumed i any, that were created by the position of this Seley, 152 U. S. 145, 14 Sup. Ct. Rep. McCharles v. Smelting Co., 10 Utah, 470, 37 l ing Co. v. Walls, 28 C. C. A. 441, 84 Fed. Re opinion that the nonsuit was properly granted

The judgment is affirmed, with costs.

BARTCH and BASKIN, JJ., concur.

FRANK V. BULLION BECK ANI MINING COMPANY

Supreme Court, Utah, March,

MASTER AND SERVANT — RISK OF EMPLOYME

BY DEFECTIVE TIMBERING. — 1. The gen

assumption by a servant of an extra hazard may circumstances of the particular case, and no fixed determine what act of the servant would constitut

2. There being evidence which tended to show that negligence, in not properly timbering the mine; i man ordered plaintiff to perform a service clearl employment, and that plaintiff relied upon the s foreman, — the risks and dangers of the unusua or readily understood, — the question of defenda tiff's contributory negligence should have been le
3. A motion for a nonsuit should specifically set forth it is based.

(Syllabus by the Court.)

APPEAL from judgment, District Court, Ju defendant.

man I saw. * * * He was at the place was giving directions. He was standing lookout. * * * He saw me as soon as I came. The moment I got to him, he said: 'Frank, carry that man out. You are big and strong, some of the others.' I had just got in fair distance there when he spoke to me. * * * me, I went right down. My intention was to go to the top of the timber, and not assist or aid the men who had not gone to the place without Brant's order. I was there, and seeing how it happened. I never saw any cave, that I know of. * * * I cannot say that it occurs, that within a short time thereafter the dirt are likely to fall." Other witnesses testified to the same facts; also, as to the extent of the alleyway by plaintiff. When plaintiff rested his case, the court granted a nonsuit, as follows: "The court grants a judgment of dismissal or nonsuit against plaintiff has not proved a sufficient case for trial. The motion is sustained and dismissed the case. The ruling of the plaintiff duly excepted.

There are two grounds upon which appeal is taken from the judgment of the trial court: First, that there is sufficient evidence of negligence on the part of the defendant to the jury; second, that no grounds are shown for a motion for a nonsuit, and therefore the motion for a judgment of dismissal is denied.

POWERS, STRUP & LIPPMAN, for appellant.

GEO. WESTERVELT, for respondent.

MCCARTY, DISTRICT JUDGE (after stating the facts) insists that, the plaintiff having voluntarily left his post of duty to the scene of the accident, the act was one of negligence, and he assumed the extra hazards and dangers to which he was exposed, and therefore cannot recover. As a servant voluntarily leaves his post of duty, and goes beyond the scope of his own employment, and, while performing any duty he owes to the master, incurs risk which could have been avoided by remaining where the duty required him to be, and is injured while so engaged, the master is not liable. We do not think, however, that the bar comes within the rule, to the extent that it is authorized in holding, as a question of law, that a servant who leaves his work, on hearing the crash or noise of a falling timber, and goes to the scene of the accident, is not liable to the master for the injury sustained.

he arrived at the scene of the accident, found and directions to the men who were endeavoring from the rocks and debris, and carry him Brant, without making any explanation of the hazards and risks, ordered plaintiff to go down and help carry him out. This was clearly outside of the scope of the plaintiff's being there, at the scene of the accident, providing a better opportunity to understand and appreciate the dangers than plaintiff, who thereby was justified in his superior knowledge of Brant, unless the danger was so obvious and could be readily seen and understood by a nature that an ordinarily prudent man, under the same circumstances, would readily see and understand. The fact that the defendant explained and pointed out to him, the danger, would not encounter them, even at the risk of losing his employment upon refusing to obey. *Linde v. Utah*, 163, 33 Pac. Rep. 692; *Dallemand v. S. Am. Neg. Rep.* 9, 51 N. E. Rep. 645. After taking into consideration all the facts, circumstances, and appearances when plaintiff first came upon the scene of the accident, that the life of a co-laborer was in imminent peril, it was his duty to determine as to whether or not plaintiff was justified in obeying Brant's orders, knew, or ought to have realized, the extent of the danger to which he was exposed. *Bailey, Mast. Liab.* p. 172; *Wilson v. Mining Co.* 84, 52 Pac. Rep. 626. The questions of negligence of the defendant and of contributory negligence of plaintiff are questions of fact, that should have been left to the jury. *Wright v. Railway Co.*, 14 Utah, 38; *Reese v. Mining Co. (Utah)* 49 Pac. Rep. 824, 2

We think the court erred in sustaining the demurrer to the complaint, for the reasons stated, and for the additional reason that the motion is too general, and does not specify the grounds upon which it is based. We are of the opinion, and moving for a nonsuit ought to be required to specify the grounds upon which he bases his motion, and the attention and that of the opposite party to the same. The California Code contains a provision which is similar to that of our own State. *Proc. sec. 581.* The Supreme Court of that State, in a number of well-considered cases, that a motion in general terms, such as the one under consideration,

sufficient to authorize a court to dismiss the action. *Poehlmann v. Kennedy*, 48 Cal. 201; *Coffey v. Greenfield*, 62 Cal. 602, and cases cited; *Belcher v. Murphy*, 81 Cal. 39, 22 Pac. Rep. 264; *Palmer v. Publishing Co.*, 90 Cal. 168, 27 Pac. Rep. 21; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. Rep. 109.

The case is reversed, with directions to the trial court to set aside the judgment of dismissal and to grant a new trial; the costs of this appeal to be taxed against the respondent.

BARTCH, Ch. J., and BASKIN, J., concur.

SMITH V. NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY.

Supreme Court, Washington, February, 1899.

CARRIER AND PASSENGER—STEAMBOAT UNABLE TO PROCEED BECAUSE OF LOW WATER. — It is no defense for the failure of a carrier to carry a passenger to his destination that the water in the river was low when the carrier could have informed itself of the condition existing.

SAME. — A passenger carried in the fall only part of his journey by a carrier that agreed to take him the whole distance has the right to be taken back by the carrier who could not have completed the journey with the passenger until the following summer.

INSTRUCTIONS. — Where it was contested whether the abandonment of a voyage by a river steamer because of low water was due to the act of God a requested charge that if the carrier carried its passenger till it was forced to stop by low water, this was the "act of God" was inapplicable.

APPEAL from judgment, Superior Court, King County, in favor of plaintiff.

BAUSMAN, KELLEHER & EMORY, for appellant.

BYERS & BYERS, for respondent.

DUNBAR, J. — The respondent sued the appellant, the North American Transportation and Trading Company, alleging an agreement by the defendant to take him from Seattle to Dawson by September 15, 1897, by way of St. Michael and the Yukon river. When the steamer *Cleveland*, on which he took passage, arrived at Ft. Yukon, it proceeded no further. It was claimed by defendant's officers that it could not proceed further by reason of low water, and the respondent was returned by the company to St. Michael, from whence, at his own expense, he returned to Seattle, the respondent paying to appellant for passage money from Seattle to Dawson City the sum of \$200. The suit is to recover the passage money, the

expense he was put to in returning to Seattle of time. The jury returned a verdict in the favor of plaintiff. He was awarded \$200, the passenger expense of return to Seattle; \$8, board paid Michael; and \$120, for loss of time. Judge affirmed this verdict, and an appeal was taken here.

It is alleged that the court erred in charging the duty of the company, if it could not take the time to bring him back to Seattle without charge. Under the circumstances, this instruction correctly is not a parallel case with those in which passenger railroads where cars are running on frequent delays are presumed to be and are purely technical contentions by the appellant in this case that there have been a temporary one, or that there was no way the passengers could have been forwarded before. There is no case that holds — and we would not hold — that passengers could be discharged from the train which they had taken passage, and forced to wait in an Alaskan climate, to await the convenience of the company for their removal the next summer.

The second assignment of error embraces the first, viz., the court directed the jury that the company could not compel or require the passengers to get off at Ft. Munook, if they were not willing to do so.

The third assignment is that the court erred in giving the following instruction asked by the defense: "You, gentlemen, that if you shall find that the company carried plaintiff to Ft. Yukon without any fault on his part, and at that place encountered a stage of water which interrupted the continuance of navigation towards Dawson in such a manner as constitutes the act of God, and that the company was unable to carry him further towards Dawson until the next summer, the jury shall find for the plaintiff, and award him the amount claimed by him to be sufficient." Conceding, without deciding, that the circumstances mentioned in the instruction justify the giving of this instruction, it does not contain the qualification that the law as applicable to this case requires. It is from the instruction the question of the duty of the company to legitimately inform itself concerning the route. The passenger, when he buys tickets from the company, must necessarily rely upon the company's representations as to the practicability and feasibility of the trip. It is for the company to put on foot inquiries con-

of the trip or probability of its being able to carry out its contract. For aught that appears in this instruction, it might have been known to the company that these passengers could not have been transported any further than the Yukon river; and yet, under the theory of the instruction, it would be justified in taking from travelers the full fare to Dawson, and leaving its passengers stranded on the route. This qualification was understood by the appellant, and acted upon in its answer to the complaint; for subdivision three of the answer is to the effect that the Yukon river was at that time so low as to be impossible of navigation between Ft. Yukon and Dawson City by the John J. Healy or any other craft plying in those waters propelled by steam, and engaged in the carriage of freight and passengers for hire; that this stage of the water between those places was utterly unforeseen by appellant, and could not have been foreseen, and was wholly unexampled. This qualification should have been incorporated in the instruction. But these instructions, together with the others, the refusal to give which is assigned as error here, are all rendered inapplicable by the undisputed testimony in the case. The court instructed the jury as follows: "Now, the defense here, really and strictly speaking, is that the defendant was prevented from taking the plaintiff from Ft. Yukon to Dawson City by circumstances over which it had no control; in other words, it bases it upon the ground of an act of God. Now, I am not going to read to you the more accurate statement that I gave to you in another case of what constitutes the act of God. In order to excuse nonperformance of a contract on the ground of an act of God, there must be no mixture in that, first, of want of diligence; there must be no admixture of negligence; there must be no admixture of want of judgment or skill. In an act of God no amount of judgment or skill or wisdom can prevent the damage or injury. That is what distinguishes it from other things that have connected with them the agency of man." This instruction, while brief, we think, was explicit and correct; and the other instructions asked, as we have said before, are not applicable, for the reason that this was the only real contest in the case, viz., whether the expedition failed by reason of the act of God. There is no pretext that there was any opportunity for this passenger to have reached Dawson by any other boat during the season of 1897. There was virtually an abandonment of the trip by the company. This is shown by the testimony of the captain of the boat, Capt. Barr. His testimony is to the effect that the water was so low in the Yukon river that the boat could not proceed, and that there was no probability or expectation of any boat getting up the river that

fall. In fact, it is conceded that the passengers they had to disembark either at Munook, Rampart City. Indeed, the captain stated that he was up showing the passengers how many pounds of coal they would need to buy to sustain them during the winter; that they could go there or at Rampart City; and he stated that if they went to either of those places, he would give them the load of the boat that consisted of provisions, and allow each passenger to take a ticket for transportation on the boat the next trip it would make. He testified conclusively that the next trip which was contemplated for that season, and that it was not expected by the company that another boat belonging to the company could be sent out for that season, he stated that ice had already come down the river. He testified on page 64 of the record that they asked to see Mr. Weare, and Mr. Weare was in the cabin of the boat. Took occasion to give them tickets for next season." So that the trip was abandoned at least for that season. In the case, the instructions asked for by the appellant, which were wise constituting the law, were not in point, and the testimony in the case.

The last error assigned is for the sustaining of the question propounded to witness Barr, in which he had agreed to release the boat from all responsibility, and were taken back to St. Michael. This statement was made to a Mr. Weare, and it was contended that it was not responsive to the question. It was contended that this conversation should have been testified to by witness, for the reason that it was testified to by witnesses Overstreet and Lambert; but we think this was properly ruled out by the trial court, for the conversation was not the conversation which was testified to by the witnesses for the respondent. At least, it was not such, and it was not shown that the respondent was to do with or was in any way concerned in the conversation discussed in that conversation.

We think there were no prejudicial errors committed in the trial of this cause, and the judgment of the court is affirmed.
GORDON, Ch. J., and FULLERTON, ANDERSON, concurred.

HARDEN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court, Wisconsin, February, 1899.

CARRIER AND PASSENGER — BALANCE OF TRAIN BACKED AGAINST CABOOSE OF FREIGHT TRAIN WITH FORCE. — Where it appeared that the plaintiff was a passenger on a freight train accustomed to carry passengers and after the caboose had been left standing with two or three cars attached for half an hour at a station, the rest of the train being engaged in switching, the plaintiff left his seat and while standing in the aisle the engine and train backed down to couple to the caboose, and struck it with such force as to throw the plaintiff down and injured him, the questions of negligence were for the jury and a judgment of nonsuit was reversed.

APPEAL from judgment of nonsuit, Circuit Court, Rock County.

Plaintiff lawfully took passage on a freight train accustomed to carry passengers, which, stopping at Elkhorn to do switching, left the caboose, with three or four cars attached, standing on the track. Plaintiff, after half an hour's wait, left his seat in the caboose, and went out on the front platform, looked at the other part of the train, consisting of the engine and seven or eight cars, moving about, realized that they were likely before long to back down and couple onto the rear portion of the train, but saw nothing indicating how soon. He returned into the car, stepped into the closet, and on coming out stopped in the aisle, with his back toward the front door, and hands in pockets, and spoke with another passenger for a moment. While so standing, the engine and front part of the train backed down to make coupling, and struck the rear part of the train with unusual severity, according to the testimony of plaintiff and one other witness, but, according to the testimony of others, with no more than usual. Plaintiff was accustomed to ride on freight trains, and had the knowledge common to that experience of the probability of a jar or shock in making couplings. The shock threw him over backward so that he struck the front door, and received injuries to his back. At the close of the testimony on both sides the Circuit Court granted a nonsuit for want of evidence of negligence on the part of the defendant, also intimating that the plaintiff was shown by uncontradicted evidence to be guilty of contributory negligence. From judgment thereon this appeal is taken.

MAHONEY & CUNNINGHAM, for appellant.

JACKSON & JACKSON, for respondent.

DODGE, J. (after stating the facts). — 1. We agree with the court below in the conclusion to go to the jury on the question of negligence. The testimony both of the plaintiff and of the defendant to show that the forward portion of the train struck the rear part with such violence as could be accounted for by the hands, or defective apparatus, or by the coupling of both witnesses is that the shock of the collision was greater than any either had known in the coupling of both had much prior experience. Slocum plaintiff testified that the backing train at four or five miles per hour, he obviously could judge only by the vibration. Plaintiff testified that the caboose was driven into the freight car. True, defendant's witnesses very fully admitted the violence; but for the purpose of nonsuit the evidence is at least such as merely raises a conflict with the plaintiff's evidence and is not to be considered. *Lewis v. Prien*, 98 Wis. 654; *O'Brien v. Railroad Co.*, 92 Wis. 340, 66 N. W. Rep. 568; *v. Railroad Co.*, 82 Wis. 568, 52 N. W. Rep. 568.

2. The question of plaintiff's contributory negligence, I think, should have been left to the jury. His negligence, if imputed, of the likelihood of an immediate collision was not clear, though, of course, he must have known that a collision would occur before very long. There is evidence to show that the stoppage in the aisle for conversation was but a moment, and the question is present whether his position was so likely an injury if the coupling were made with such violence as to be perilous only in the event, not to be anticipated as a violent one. The nonsuit was improper.

Judgment reversed, and cause remanded for a new trial.

NELSON V. SHAW

Supreme Court, Wisconsin, February 18, 1891.

MASTER AND SERVANT — DEFECT IN MASTER'S PROMISE TO REPAIR — INJURY TO SERVANT'S LOAD. — A teamster engaged in drawing tan bark on a private road and aware of a defect therein from his previous experience, assumes the risk, but if the employer promises to repair before the teamster will have occasion to pass over the road, upon the promise, and is not precluded from

sustained by reason of the failure of the employer to repair, on the ground that the risk was assumed.

FAILURE OF SERVANT TO INSPECT ROAD AFTER PROMISE OF MASTER TO REPAIR. — The plaintiff's duty did not require him to repair the defect though it was a matter of ordinary labor. He could rely upon the promise of the foreman to repair it and it was not contributory negligence for him to drive down the hill without first ascertaining whether the promise had been fulfilled, the defect not being so eminently dangerous as to require it.

CONTRIBUTORY NEGLIGENCE. — Whether the plaintiff was guilty of contributory negligence in driving down the hill while sitting on the load with the soles of his boots even with the front end of the load, with nothing for his feet to brace against, was for the jury.

APPEAL from judgment, Circuit Court, Taylor County, in favor of defendant.

FRAWLEY, BUNDY & WILCOX, for appellant.

LOSEY & WOODWARD, for respondent.

CASSODAY, Ch. J. — This action was commenced September 4, 1897, to recover damages for personal injuries sustained January 25, 1895, by the plaintiff, while in the employ of the defendant as a teamster hauling tan bark from the lands described, for a distance of about eight miles, to the defendant's tannery at Rib Lake, by reason of an alleged defective private branch road way provided and used by the defendant and his employees in hauling such bark. Issue being joined, and trial had, the court, at the close of the testimony, directed a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff brings this appeal.

It appears and is undisputed that this branch roadway was built to get the bark to the main road, and was from one-half to three-fourths of a mile in length; that from the point where it connected with the main road it ran in a northeasterly direction, and was known as the "Mud Lake Branch;" that the portion of the roadway in controversy extended from its junction with the main road northeasterly; that at a point some fifteen to thirty-five feet from its junction with the main road this bark roadway began to ascend a hill for a distance of about 105 feet; that the descent in that distance was a few inches less than eleven feet. There is evidence tending to prove that at or near the foot of such descent there was a ditch and gully which existed in the traveled track, and extended at right angles to the traveled track; that the ditch and gully were partially concealed from the plaintiff by a log; that the front bob of the sleigh was precipitated into the ditch and gully with a quick, sharp jolt and plunge, and the plaintiff was violently thrown off the load, and injured; that the plaintiff had had considerable experience

working in the woods, building logging roads; that he had put in logs and repaired the road; that he began to haul bark for the defendant in 1894, and, after working continuously in hauling bark, he began to haul bark on this Mud Lake branch of the road to the injury; that during that time he had been down from eleven to thirteen times — the last time being the day on which the accident happened, and he had observed its condition; that on the evening before the accident the plaintiff told defendant's foreman about the condition of the bottom of the hill, and that it was dangerous to quit work if the defendant did not fix the road; that he then said he would have it fixed; that the plaintiff came out when he would do so, and he then promised to have it fixed before the plaintiff came out with another load; that on the morning in question several loads of bark on this road, loaded with bark; that the lead team of the Erbocker's — was delayed at or near the intersection of the branch with the main road by having its load, or part of it, compelled the teams behind it to wait until the plaintiff's team stopped for this reason, that the hill described as being 105 feet long; that the plaintiff's team at that place, and went across the hill to get a lunch, while waiting; that he remained there about ten minutes, and returned the same way to his place; that he then walked down the hill to the place where the men were working; that there was nothing on the hill to hold it in place; that it was not bound on the hill; that the plaintiff sat on the middle of the load, with his feet even with the front end of the load, when the accident happened.

The question recurs whether the court was justified in taking the case from the jury. There is testimony that the hole was about eighteen inches deep and one foot wide one way and some three feet the other way; and that there were two holes near each other. The defendant offered evidence to prove that there was no hole in or alongside the road, but only a depression in the surface of the road; that the water was at times fourteen inches deep, and that the road was frozen solid at the time in question, and that the road was perfectly level at that place. Of course, we must assume the evidence most favorable to the plaintiff to be true and undisputed. *Kaples v. Orth*, 61 V

633. Upon such assumption two questions present themselves for consideration. The first is whether the plaintiff, after having passed over the road so many times, and knowing all about the alleged defect, did not assume the risk. We are all clearly of the opinion that he did, up to the time when the defendant expressly promised to repair the defect the next morning, and before the plaintiff would return with another load. Counsel contend that the plaintiff had no right to rely on such promise, but should have repaired the defect himself. This is put upon the theory that the repairing of the defect was not a matter of which the plaintiff had little or no knowledge, but a matter of ordinary labor, with which he was entirely familiar, like certain cases cited. *Corcoran v. Gaslight Co.*, 81 Wis. 191, 51 N. W. Rep. 328; *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. Rep. 257; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. Rep. 56. But we do not understand that the plaintiff's duty required him to repair the defect. If the defendant expressly promised to repair the defect before the plaintiff returned with his load, then we perceive no rule of law which precluded the plaintiff from relying on such promise. *Ferriss v. Machine Works*, 90 Wis. 541, 63 N. W. Rep. 234; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Wust v. Iron Works*, 149 Pa. St. 263, 24 Atl. Rep. 291; *Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. Rep. 417. Nor was the defect so imminently dangerous as to make it contributory negligence, as a matter of law, for the plaintiff to undertake to drive down the hill without first ascertaining whether the defendant had redeemed his promise to repair. *Burnell v. Railroad Co.*, 87 Wis. 387, 58 N. W. Rep. 772; *Schultz v. Lumber Co.*, 91 Wis. 626, 65 N. W. Rep. 498; *Jensen v. Sawmill Co.*, 98 Wis. 73, 73 N. W. Rep. 434; *Curran v. A. H. Strange Co.*, 98 Wis. 598, 74 N. W. Rep. 377. The most serious question in the case is whether the plaintiff was not guilty of contributory negligence, as a matter of law, in driving down the hill while sitting on the load with the soles of his boots even with the front end of the load, and hence with nothing for his feet to brace against. But upon the whole evidence we are constrained to hold that the question of contributory negligence was for the jury. *Kenworthy v. Town of Ironton*, 41 Wis. 647; *Simonds v. City of Baraboo*, 93 Wis. 40, 67 N. W. Rep. 40. The appellant's brief is unnecessarily long, and does not comply with the rules, and hence only thirty-five pages of it should be taxed.

The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

PIERCE V. TENNESSEE COAL
RAILROAD COMPAN

Supreme Court, United States, Febr

**MASTER AND SERVANT — AGREEMENT TO PA
CERTAIN WAGES — HIRING NOT FROM MO
TERMINABLE AT OPTION OF MASTER. —** 1
defendant's employ, was injured, and claimed
liable, which the defendant denied. An agreemet
ties in order to settle the matter, that the plainti
supplies and be paid regular wages while he wa
in force for six months, when another agreemen
resumed work that the company should give him
and pay him wages as before his injury, and this
year, when in lieu of the previous agreements,
recited the claim for damages and the two previo
that his wages " from this date " should be a cert
he should receive certain supplies, and he, on hi
the company from all claims for damages for h
last agreement was not a hiring from month to m
at the pleasure of the company, but was a contrac
to pay him the stipulated wages and to furnish hi
his disability to do full work continued, and that i
him from its service without cause, he was entitle
tract as finally broken, and in an action upon th
evidence as to his expectancy of life, and show th
nent, and in that event he was entitled to recove
received in the future as well as in the past if the

CERTIORARI to the Circuit Court of Appeal

This was an action brought January 22, 189
of Jefferson County, in the State of Alabama,
a citizen of the State of Alabama, against the
& Railroad Company, a corporation of the
doing business in the State of Alabama, up
signed by the parties, and in the following te

" Pratt Mines, Ala., 4th June, 1890. Wh
while in the employ of the Tennessee Iron, C
pany, Pratt Mines Division, as a machinist,
trip of tram cars on the main slope of the
No. 2,' and operated by the Tennessee C
Company, under circumstances which I claim
pany liable to me for damages; but wher
liability for said accident, or the injuries

but that the defendant, without any reasonable abandonment of the contract and refused to carry the defendant was under no obligation to pay wages therein stipulated longer than suited wholly and purposely disregarded and refused obligations of the contract for the period of six months from the commencement of the suit, and had entirely abandoned and discharged the plaintiff from its service. The plaintiff prayed for damages in the sum of \$50,000 for the defendant's breach of the contract.

The defendant demurred to the complaint on the ground that the contract set out therein was one of hiring, not of service for life, and that it appeared from the allegations that the defendant, in terminating the contract, exercised its legal right under the contract. The court overruled the demurrer, and the plaintiff declining to accept the judgment for the defendant; and on the 21st, 1894, appealed from that judgment to the Supreme Court of Alabama.

The record transmitted to this court does not show the proceedings in the Supreme Court of Alabama. The reports of its decisions show that at November term, 1894, it reversed that judgment, and remanded the case to the State court. *Pierce v. Railroad Co.*, 110 Ala. 533, 19 South. 221. The record before this court necessarily implies that the Supreme Court of Alabama, in reversing the judgment of the State court, was influenced by prejudice and local influence it would be unjust in the State courts, the case was remanded to the Circuit Court of the United States for the Southern division of the Northern district of Alabama. The remand of the case to the State court was made on the ground that the ground did not appear in the record), and the case was remanded to the State court.


In the Circuit Court of the United States for the Southern division of the Northern district of Alabama, the following proceedings took place: The plaintiff renewed his complaint, and on the 1st of January, 1895, the plaintiff then amended his complaint by inserting therein the words above set forth, and a demurrer to the amended complaint was filed. In answer to this complaint the defendant filed a denial of each and every allegation of the complaint, and a demurrer to the amended complaint was filed. The defendant, for further answer to the complaint, under and by the terms of the contract set

contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by defendant therein; and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter, and that while engaged in the performance of such service the plaintiff voluntarily, and without excuse therefor, refused to further perform such service as he was able to perform and was in fact performing for the defendant as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract." The plaintiff joined issue on the first plea, and demurred to the second plea upon the ground that it did not go to the whole consideration of the contract, and was no answer to the entire action; and the court sustained his demurrer. The defendant, for further answer, and by way of recoupment, pleaded that on May 3, 1891, the plaintiff, voluntarily and without excuse, refused to perform such labor as he was able to perform and was in fact performing for the defendant as required by the contract, and since that time had continued to refuse to perform, and had not in fact performed, such service, or any part thereof, to the damage of the defendant in the sum of \$50,000.

A bill of exceptions tendered by the plaintiff and allowed by the court showed that at the trial before the jury the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on, and introduced evidence tending to prove the allegations of the complaint. He also offered evidence that at the time of his discharge by the defendant from its employment in May, 1891, he was fifty-five years of age, and that he was then, and had since been, in good health, and addicted to no habits, of drinking or otherwise, affecting his health and expectancy of life, and introduced the American tables of mortality used by insurance companies, showing his expectancy of life at the time of his discharge and at the time of the trial.

But the court ruled that no recovery could be allowed on the contract, beyond the installments of wages due and in default up to the date of the trial, and, upon the defendant's motion, excluded all evidence of the plaintiff's age, health, and expectancy of life, "on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed."



The plaintiff duly excepted to the ruling evidence, and, to present the same point, a and duly excepted to its refusal to give, the the jury: "If the defendant, after making and before the suit, refused further to pay t nish the articles stipulated to be furnished, the plaintiff, and discharged him, the plainti benefit of his contract, which is the presen agreed to be paid and the articles to be furnis for the period of his life, if his disability i sum as the jury may find the plaintiff may future, and may have been able heretofore loss as the defendant may have sustained fro tiff's service without the defendant's fault."

The defendant also tendered and was allow presenting substantially, though in differer involved in the plaintiff's case, and the cor fore, need not be particularly stated.

The jury returned a verdict for the plainti upon which judgment was rendered. Each p error from the Circuit Court of Appeals for t

That court was of opinion that the contrac employment by the month, and therefore, employment, subject to be discontinued, at t at the expiration of any month, or at any tim and, consequently, that there was error in o to the complaint, and upon that ground, wit other question in the case, reversed the ju Court of the United States, and remanded th further proceedings, Judge Pardee dissentin 365, 26 C. C. A. 632, and 81 Fed. Rep. 814 upon applied for and obtained a writ of cer 168 U. S. 709, 18 Sup. Ct. Rep. 950.

W. A. GUNTER, for petitioner.

WALKER PERCY and WM. I. GRUBB, for res

MR. JUSTICE GRAY (after stating the case) of the United States a verdict and judgment plaintiff for a less amount of damages than party alleged exceptions to rulings and inst and sued out a writ of error from the Circ That court held that the defendant's dem should have been sustained, and therefore re the Circuit Court, and remanded the case f

The effect of the provisions and recitals may be summed up thus: The successive agreements were all made with a view to settle plaintiff's claim against the defendant for payment to him by the defendant's cars while he was a machinist, and seriously impairing his ability to work. The agreement the defendant was to pay him certain wages and furnish him with certain supplies. The supplies were evidently a minor consideration, and require no further consideration. The more important matter is the wage agreement. The defendant first agreed to pay the plaintiff "regular wages while he is disabled." The agreement, in that form, would be continued to be disabled, and could not have been made by the defendant without the plaintiff's consent. The agreement, made after the plaintiff had been disabled, was "to give him work, such as he was capable of doing, therefor the wages paid before said accident; and if he is unable to do such work, then the defendant shall pay him the wages he was receiving before said accident." That agreement must be considered as a measure of damages, first, requiring the plaintiff to do such work as he was capable of doing, showing that he was still much disabled by the accident. The final agreement in writing of June 4, 1890, after the plaintiff's claim for damages for these injuries, and the defendant's agreement, his wages were increased by a certain amount. The agreement "wages from this date are to be \$65 a month." The agreement released the defendant from all liability for the plaintiff's claim against him from the accident or from the effects thereof. This should be a full and satisfactory settlement against the defendant.

The only reasonable interpretation of this agreement is that the defendant promised to pay the plaintiff wages at the rate of \$65 a month, and to allow him his fuel and the balance of his expenses as long as his disability to do full work continued. The consideration of these promises of the defendant to the plaintiff to do such work as he could, and to release the plaintiff from liability upon his claim for damages for his injuries, is the intention of the parties that, while the plaintiff is disabled, the defendant shall pay him the wages he was receiving before the accident, and the plaintiff shall cease to perform all the obligations he was under by contract, and the consideration of that release, finds no support in the contract, and is too unlikely to be presumed. *Mass. 544, 547, 46 N. E. Rep. 117.*

The Supreme Court of Alabama, when the case was brought on appeal from the County Court, and before the

case into the Circuit Court of the United States, expressed the opinion that "the contract is sufficiently definite as to time, and bound the defendant to its performance, so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life," and upon that ground reversed the judgment of the County Court sustaining the demurrer to the complaint, and remanded the case to that court. 110 Ala. 533, 536, 19 Southern Rep. 23. As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case. See *Williams v. Conger*, 125 U. S. 397, 418, 8 Sup. Ct. Rep. 933; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140; *Telegraph Co. v. Burnham*, 162 U. S. 339, 344, 16 Sup. Ct. Rep. 850, and cases cited; *Moulton v. Reid*, 54 Ala. 320.

It follows that the judgment of the United States Circuit Court of Appeals in this case was erroneous, and must be reversed.

It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

Upon this point the authorities are somewhat conflicting; and there is little to be found in the decisions of this court having any bearing upon it, beyond the affirmance of the general propositions that "in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including, not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant," and, "in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence" (*Railroad Co. v. Putnam*, 118 U. S. 545, 554, 7 Sup. Ct. Rep. 2), and that in an action for breach of contract "the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken" (*Benjamin v. Hilliard*, 23 How. 149, 167).

But the recent tendency of judicial decisions in this country, in actions of contract as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single

action, and thus avoiding the embarrassment of repeated litigation. This especially appears in cases of agreements to furnish supplies, a few only of which need be referred to.

[illegible]

to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind, and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death. *Daniels v. Newton*, 114 Mass. 530, decides that an absolute refusal to perform a contract, before the performance is due by the terms of the contract, is not a present breach of the contract, for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract, after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." 133 Mass. 75, 76. It is proper to remark that the point decided in *Daniels v. Newton* was left open in *Dingley v. Oler*, 117 U. S. 490, 503, 6 Sup. Ct. Rep. 850, and has never been brought into judgment in this court.

So, in *Schell v. Plumb*, 55 N. Y. 592, the action was by a woman, for a breach of an oral contract by which the defendant's testator agreed to support the plaintiff during her life, and she agreed to render what services she could towards paying for her support. The contract was carried out for some years, and the defendant then turned her away, and refused to support her. At the trial, the judge, against the defendant's objection, admitted in evidence the Northampton tables of life annuities, to show the probabilities of life at the plaintiff's age, and instructed the jury that if the plaintiff was turned out in violation of the contract, without any misconduct on her part, she was entitled to recover damages from the breach of the contract to the time of trial, deducting what wages she might have earned during that time, and also to recover for her future support and maintenance, as to which the jury were instructed as follows: "Your verdict is all she can ever recover, no matter how long she may live. That ends the contract between these parties, and you will decide, considering her age, her health, her condition in life, and the circumstances under which she is placed, how long she will probably live, and how much services she can probably perform in the future, and say how much more it will cost her to support herself than she will be able to earn, and allow her to recover for such sum." The verdict was for the plaintiff and judgment was rendered thereon. The defendant appealed, contending that, if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or at most to the time of trial, and that, as to the future, it was impossible to

ascertain the damages, as the duration of his further uncertainty arose from the future of the person. But the Court of Appeals, in an opinion of Judge Grover, affirmed the judgment, saying of the testator was to support the plaintiff was a continuing contract during that period entire, and a total breach put an end to it, a right to recover an equivalent in damages, the present value of her contract." "It may be that in actions for personal injuries the constant recovery for such prospective damages as the party will sustain, notwithstanding the duration of his life, and other contingencies which the amount." 55 N. Y. 597, 598. See also Vt. 582; *Sutherland v. Wyer*, 67 Me. 64.

In *Railroad Co. v. Staub*, 7 Lea, 397, the facts were like those in the case at bar. The plaintiff, an employe of the defendant railroad company, after the discharge of his duties as such, received in a collision between his locomotive engine and a passenger train brought an action to recover damages. An agreement, by way of compromise, was entered into in consideration of the plaintiff's agreeing to resign, the defendant agreed to pay the costs thereof, the plaintiff's attorney's fee and physician's bills, and furnished him in its employ, the plaintiff working when he was able to do so, and performing only such light work as he was able to do in his disabled condition he might be able to perform. The defendant agreed to pay him a certain specified sum per month, and to continue as long as the injuries should last. After this agreement the plaintiff continued, at the defendant's light work for the defendant, receiving pay, at the rate of time he actually worked, and the defendant was liable under the agreement, and refused to continue the service under it. The Supreme Court held that the plaintiff was entitled to recover the entire damages, not only for wages already due but for damages to the extent of the benefit that he realized under the contract; and, speaking of the agreement, said: "It is a mistake to suppose, as has been said, that because, in estimating the damages, we are to take into account the course of events after the suit is brought, we

the contract as absolutely and finally broke maintain this action, once for all, as for a to contract; and to recover all that he would future, as well as in the past, if the contract doing, he would simply recover the value of the time of the breach, including all the resulting from the total breach of the contract. The uncertainty of estimating damages that the future is no greater in this action of course than it would have been if he had sued the defendant, to recover damages for the personal injuries instead of settling and releasing those damages and suing on.

In assessing the plaintiff's damages, deduction must be made of any sum that the plaintiff might or might earn in the future, as well as the loss the defendant had sustained by the loss of the plaintiff without the defendant's fault. And such a deduction is for in the instruction asked by the plaintiff's judge.

The questions of law presented by the defendant's motions, allowed by the Circuit Court of the United States, are substantially like those above considered, and require the same answer.

The result is that the judgment of the Circuit Court sustaining the demurrer to the complaint, and the judgment of the Circuit Court of the United States reversing that judgment, are both reversed, because of the rulings excepted to, and that the case must be remanded to the Circuit Court to set aside the verdict and to order a new trial.

Judgments of the Circuit Court of Appeals and the Circuit Court of the United States reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this court.

But by section 5144 of the Revised Statutes force, it was provided that, "except as of action or proceeding pending in any court sh of either or both of the parties thereto, exce slander, malicious prosecution, assault, or ass nuisance or against a justice of the peace fo which shall abate by the death of either part 1890, p. 1491. That section was construed in Ohio St. 313, 41 N. E. Rep. 254, which was i injuries caused by the negligence of a corpo The Supreme Court of Ohio said: "The acti at the time of the death of the plaintiff. It is enumerated exceptions of section 5144, and w revived and prosecuted to judgment in the na tor of the deceased plaintiff."

The Revised Statutes of Indiana, in which received, provide that "no action shall abate bility of a party, or by the transfer of any ir cause of action survive or continue" (sectio cause of action arising out of an injury to th person of either party, except in cases in wh for an injury causing the death of any per seduction, false imprisonment and malicious 283).

By section 955 of the Revised Statutes c brought forward from the judiciary act of : Stat. 90, c. 20, sec. 31), it is provided that parties, whether plaintiff or petitioner or de any court of the United States, dies befor executor or administrator of such deceased cause of action survives by law, prosecute o to final judgment."

The question upon which the court below of this court is this:

"Does an action pending in the Circuit Cot sitting in Ohio, brought by the injured person damages for injuries sustained by the neglig in Indiana, finally abate upon the death of t the fact that, had no suit been brought at a would have abated both in Indiana and Ohio had been brought in Indiana, the action wo State?"

If the case had not been removed to th



proceeded to final judgment, notwithstanding the Revised Statutes of the United States. It ought not to be construed as embracing the view that it ought to be supposed that Congress intended the removal of an action from a State court to be a bar to the defendant prior to the death of the plaintiff, or to ignore the law of the State in reference to such actions, and make the question of revivor depend upon whether the cause of action would have survived if brought. If Congress could legislate to that effect, it so. It has not established any rule that would require the law of the State under which the present action was instituted, and which, at the time the suit was brought, when the plaintiff in an action for personal injury, to revive in the name of his personal representative. Cases like this may reasonably be expected to be prescribed by section 955.

These views are in harmony with section 955 of the Revised Statutes, which was brought forward from the Revised Statutes of 1875 (1 Stat. 92, c. 20, sec. 34), and provide that "in all the States, except where the Constitution of the United States otherwise require or provide, the rules of decision in trials at common law, in equity, and in admiralty, in cases where they apply;" section 914, providing that "the practice, procedure, and modes of proceeding in civil causes, in admiralty causes, in the circuit and district courts, as near as may be, to the practice, procedure, and modes of proceeding existing at the time of the adoption of the Constitution of the United States, shall be the same as of record of the State within which such circuit or district court is held, any rule of court to the contrary notwithstanding." In accord also with what was said in *Martin v. Hunter's Lessee*, 15 U. S. 673, 692, 14 Sup. Ct. Rep. 541, in *Schreiber v. Sharpless*, 110 U. S. 76, 80, the court said: "In that case, the right in question was for a penalty under a statute of the United States, and whether it survived was governed by the law of the State. But in the case at bar the question whether the right of action depends upon the law of the State in which the action was brought and the administrator of the estate of the plaintiff is not in question." *Henshaw v. Miller*, 17 How. 212.

It is scarcely necessary to say that the question of the right to revive this action is

personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio Court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that State, rather than by the law of the State in which the injuries occurred.

The question propounded to this court must be answered in the negative. It will be so certified to the Circuit Court of Appeals.

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